RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक ३९] गुरुवार ते बुधवार, डिसेंबर ११-१७, २०१४/अग्रहायण २०–२६, शके १९३६ [पृष्ठे ३२, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.

IN THE INDUSTRIAL COURT AT MUMBAI

REVISION APPLICATION (ULP) No. 11 OF 2002.—Messrs Sai Industries, Plot No. 07, Phase II, MIDC Industrial Area, Andheri East, Mumbai 400 092.—*Applicant*.—*Versus*— Shri Manbahadur Singh, C/o. Khadak Singh G. Dhami, Dr. Babasaheb Ambedkar Nagar, Road No. 08, Room No. 81, MIDC, Andheri East, Mumbai 400 093.—*Non Applicant.*

In the matter of revision application under section 44 of M.R.T.U. and P.U.L.P. Act, 1971, against Order dated 30th November 2001 passed in Complaint (ULP) No. 447 of 1998 passed by Xth Labour Court, Mumbai.

PRESENT.—Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.—Shri L. R. Mohite, Advocate for Applicant;
Shri B. K. Hegade, Advocate for Non Applicant.

Judgment and Order

(Dated the 8th December 2003)

1. By this revision, Applicant Sai Industries is challenging the judgment and order dated 30th November, 2001 passed in Complaint (ULP) No. 447 of 1998 by Xth Labour Court, Mumbai.

2. Facts in brief of revision are as follows :—

Non Applicant No. 1 Manbahadur Singh has filed Complaint (ULP) No. 447 of 1998 against Applicant company for unfair labour practices covered under item 1(a), (b), (d), (f) and (g) of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971. Non Applicant No. 1 was in the employment of Applicant company as a watchman. Non Applicant No. 1 had applied for loan to Applicant company on 18th March 1998 for Rs. 20,000 as he wanted to get his son married. Non Applicant No. 1 was granted leave wages Rs. 3,000. Non Applicant No. 1 had been to his native place and came back on 19th June 1998. He had been to company on 20th June 1998 to resume his duty, but he was not allowed to resume his duty by Mr. B. R. Sawant. Applicant abused non Applicant No. 1 in filthy language. Mr. Ajay Kunal came to the gates of the factory and threatened non Applicant No. 1. Non Applicant had sent letter dated 30th June 1998 to Applicant company and while replying said letter by Applicant stated about termination of service of non Applicant No. 1.

3. The case of the Applicant was that non Applicant No. 1 had tendered his resignation on 7th April 1998 and went to his native place for marriage of his son. Non Applicant No. 1 had requested Applicant company to settle his dues and in token of entire dues, amount of Rs. 23,224 was paid to non Applicant No. 1.

4. It is contended by Applicant that they received letter dated 30th April 1998 by non Applicant No. 1 falsely alleging therein of borrowing loan of Rs. 20,000 from Applicant company and receipt of Rs. 3,000 towards leave wages. The allegations are also made against Applicant company by non Applicant No. 1 that he was not allowed to report on duty on 21st June 1998.

5. After having been heard the parties, Learned Labour Judge was pleased to allow Complaint (ULP) No. 447 of 1998 directing Applicant company to reinstate non Applicant No. 1 with continuity of service and pay back wages by order dated 30th November 2001 which is impugned in the present revision.

6. Heard Learned Advocates for Applicant company and non Applicant No. 1.

7. Following points arise for my determination :—

Points	*Findings*
(1) Whether Applicant has proved that the impugned order dated 30th November, 2001 is erroneous, illegal or suffers with perversity, therefore it liable to be quashed and set aside ?	No,
(2) What order ?	Revision application is dismissed.

Reasons

8. Before touching to the merits of revision, it becomes necessary to throw light on certain events occured. Record shows that my Learned Predecessor was pleased to dispose of present revision by his order dated 27th January 2003 in absence of Applicant company. Applicant company had filed restoration application (ULP) No. 30 of 2003 praying therein to afford an opportunity to take part in the revision as they have good and strong case on merits. After having been heard the Learned Advocates representing the parties, restoration application (ULP) No. 30 of 2003 was allowed by order dated 3rd September 2003 by which *ex parte* order dated 27th January 2003 was set aside and given opportunity to Applicant company and non Applicant No. 1 to make submission afresh. Accordingly, today *i.e.* on 8th December 2003 heard Learned Advocates for Applicant company and non Applicant No. 1 and taken the matter for decision on merits.

9. Order dated 30th November 2001 is assailed on the grounds that Learned Labour Judge was totally misguided himself by accepting xerox copy of the letter dated 18th March 1998 and without application of mind passed erroneous order. The real controversy for adjudication is to decide whether non Applicant No. 1 had tendered resignation and accepted entire legal dues or it was oral termination of service of non Applicant No. 1 by Applicant company since non Applicant No. 1 was not allowed to resume his duty. Learned Labour Judge was pleased to consider documentary evidence *i.e.* application to obtain loan from Applicant company and for leave wages Exh. U-10, resignation letter dated 7th April 1998 Exh. C-11, receipt of legal dues Exh. C-12, office copy of letter Exh. C-14, letter of Complainant dated 30th June 1998 Exh. U-12. These documents have been examined by Learned Labour Judge alongwith pleadings and oral evidence of parties. Non Applicant No. 1 has examinal himself and Applicant company has examined original Respondent No. 3 Mohan Khatri in support of their rival contentions. According to non Applicant No. 1, he had borrowed loan of Rs. 20,000 for marriage of his son and received Rs. 3,000 towards his leave wages and accordingly passed two separate vouchers in favour of Applicant company. The grievance of non Applicant No. 1 is that after he returned back from his native place had been to Applicant company to resume his duty, but he was not allowed to join duty, which amounts to oral termination of his service with effect from 20th June, 1998. Learned Labour Judge has discussed

the defence set up by Applicant company about tenderring resignation by non Applicant No. 1 on 7th April 1998 *vide* Exh. C-11 and received by him full and final legal dues on 6th April 1998. While analysing the oral and documentary evidence. Learned Labour Judge has given finding as to how it is possible the legal dues received by non Applicant No. 1 on 6th April 1998 earlier one day of tenderring his resignation *i.e.* on 7th April 1998. Taking into consideration, Learned Labour Judge has given his finding that the defence set up by Applicant company is not inspiring the confidence and seems the story made out afterthought by Applicant company.

10. Learned Advocate for non Applicant No. 1 has invited attendion of this Court to the receipt of full and final settlement wherein four entries are shown as to how non Applicant No. 1 has received his legal dues. First entry in the letter full and final settlement Exh. C-7 is regarding bonus at 20% Rs. 3,360, second entry is relating to ex gratia/gratuity payment Rs. 9,692, third entry is additional 15 days wages Rs. 9,692 and last entry is 6 days salary for the month of April, 1998 for Rs. 480 and thus the total amount, according to Applicant company, received by non Applicant No. 1 towards his legal dues is Rs. 23,224. The document Exh. C-5 is the payment voucher.

11. Document Exh. C-11 *i.e.* alleged resignation letter dated 7th April 1998 does not bear endorsement of the management that it was accepted by them, therefore, say of non Applicant No. 1 is that resignation automatically cannot be effective and thus he deemed to be in service of Applicant company. Learned Advocate for Applicant has placed reliance on the case of Ravindran T. *V/s.* Presiding Officer, Labour Court, Coimbatore and others reported in 2002 III LLJ 160 Madras, wherein held in Para 5,—

> "In other words, the argument of the Learned Counsel for the petitioner is the contract cannot be brought into existance or terminated except in writing. The argument is not accepted because the contract under the Indian Contract Act can be brought into existance orally. Offer can be made orally and acceptance can also be made orally. Once the offer is accepted, there is a contract. Similarly, once the offer of resignation has been accepted, then also the termination of service is complete. Therefore, the Labour Court has rightly concluded that the resignation was accepted and that was valid and therefore, dismissed the industrial dispute."

Further reliance is placed by Learned Advocate for Applicant company on the case of Anand Kumar Tiwari *V/s.* Superintendant of Police, Jaunpur and others reported in 2002 LIC 552 Allahabad, wherein held in Para 18,—

> "The resignation being a bilateral Act, it becomes complete when the offer of resignation is accepted."

Further held in supra in Para 19 that,—

> "That being the position, is the Petitioner would have withdrawn his resignation during his leave period, he would have certainly been allowed to do so. The Opponent have contended that the Petitioner had, in fact, withdrawn the resignation already submitted by him. There is no doubt that resignation can always be withdrawn before its acceptance."

Reliance is also placed on the case of K. Sudha Nagraj *V/s.* The Chief Manager, Andhra Bank and another reported in 1998 LLR 847 Andhra Pradesh, wherein held in Para 12,—

> "Resignation submitted by the employee on 19th January 1990. Not accepted till 19th September 1990. Withdrawal of Permissibility can be withdrawn before its acceptance is communicated to the employee-Petitioner employee tenderring resignation due to domestic reason. Its acceptance not communicated to her till date of withdrawal of resignation. Cannot be acted upon."

Thus, it is clear that before acceptance of resignation, an employee can withdraw his resignation or entitled to withdraw his resignation. In the present case, say of non Applicant No. 1 is that he never tendered his resignation hence the question of withdrawal of his resignation dose not arise. According to Learned Advocate for Applicant company, as soon as resignation is

tendered, on the same day it becomes effective. Learned Advocate for Applicant has placed reliance on the case of K. C. James Mathew *V/s.* Cement Corporation of India Ltd., New Delhi and others reported in 1997 II CLR 278 Kerala, wherein held in Para 4,—

"Resignation by an employee would, however, normally required to be accepted by employer in order to be effective."

From the ratio laid down in the above referred cases on which reliance is placed by Learned Advocate for Applicant company, it is clear that resignation of an employee cannot automatically be affective and under the common law resignation is not complete untill it is accepted by proper authority and before such acceptance an employee can change his mind and withdraw his resignation.

12. Learned Advocate for non Applicant No. 1 has given more emphasis to the provisions of Sec. 44 of the M.R.T.U. and P.U.L.P. Act under which present revision is filed by Applicant company and according to him, the revisional Court cannot travel beyond the scope of said Section. Further, he urged that the revisional Court cannot re-assess or re-appreciate the evidence and only limited power is to see perversity or arbitrariness if it is on the face of judgment and order. Learned Advocate for non Applicant No. 1 has placed reliance on the case of Vitthal Gatalu Marathe *V/s.* MSRTC and others reported in 1995 I CLR 854 and the case of R. A. Yadav and others *V/s.* Special Steel Ltd. and another reported in 2003 I CLR 443 Bombay. The ratio in both above referred cases is in exercising limited jurisdiction under section 44 of M.R.T.U. and P.U.L.P. Act, Industrial Court cannot re-appreciate evidence and cannot give different finding.

13. Learned Advocate for Applicant during course of his arguments has invited attention to xerox copy of letter dated 30th June 1998 Exh. U-12 on which reliance is placed by Learned Labour Judge and according to him, it being a xerox copy should not have been considered as the evidence. Learned Advocate for non Application No. 1 has submitted that letter Exh. U-12 also referred by Applicant company during cross examination of non Applicant No. 1, therefore, Learned Labour Judge has rightly considered that said letter. In support of the statement made by Learned Advocate for non Applicant No. 1, he is taking help of the case of New Hind Textile Mills Unit of NTC (SM) Ltd. Mumbai *V/s.* Rashtriya Mill Mazdoor Sangh, reported in 2003 III CLR 332 Bombay, wherein held in Para 4 that,—

"Any objection as regards the genuinances of such copy is required to be raised before the document is admitted in evidence and marked as Exhibit and no contention in that regard can be intertained at the final stage once the document is marked as Exhibit in evidence. Being so, the refusal on the part of the Labour Court to consider the notice of change solely on the ground it being a xerox copy is clearly improper and illegal."

In the light of oral and documentary evidence, Learned Labour Judge has adjudicated the controversy in correct perspective. Applicant company has failed to prove error, illegality or perversity in the orders impugned on the face of it. In this bank ground, interference is called for in the order impugned, hence present revision application deserves to be dismissed as per order passed below :—

Order

Revision Application (ULP) No. 11 of 2002 is dismissed. No order as to costs.

Records and proceedings in Complaint (ULP) No. 447 of 1998 be sent to Labour Court, Mumbai.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 8th December 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) No. 1615 of 1991. —(1) Saudi Arabian Airlines Employees Association, 24, Pitale House, Bhendy Lane, Gamdevi, Mumbai 400 007, (2) Ibrahim Merchant, Meca Manzil, St. Monica Street, Bandra (West), Mumbai 400 050, (3) Syed Ali Hyder Rizvi, C/o. Raj and Company, Jer Mansion Building, Opp. Petit Street, Gawalia Tank, Mumbai 400 036.—*Complainants*.—*Versus*—(1) Saudi Arabian Airlines, Express Towers, Nariman Point, Mumbai 400 021, (2) Mr. Saud Al-Jalak, Country Manager, India, Saudi Arabian Airlines, Express Tower, Nariman Point, Mumbai 400 021.—*Respondents*.

In the matter of unfair labour practies under items 6 and 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971.

PRESENT.—Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.—Mr. A. S. Peerzada, Advocate for Complainants;
Mr. Paul Paulose, Advocate for Respondents.

Judgement and Order

(Dated the 19th December 2003)

1. This complaint is under items 6 and 9 of Schedule IV of M.R.T.U. and P.U.L.P. Act, 1971.

2. Facts in brief of complaint are as follows :

Complainant No. 1 is a trade union registered under the Trade Unions Act, 1926 and Complainants Nos. 2 and 3 are the employees of the Respondent company. Complainant No. 1 is a recognised union under the M.R.T.U. and P.U.L.P. Act, 1971. Complainants Nos. 2 and 3 were employed by Respondents as per the appointment letters dated 31st August 1989 as security guards. Respondent No. 1 is the foreign company engaged in the business of air transport. Though the Respondent management have signed the settlement on 31st June 1989 with complainant No. 1 union but they have not approved and appreciated the legitimate trade union activities of Complainant No. 1 union and are adopting non co-operative attitude with a view to undermine the collective bargaining strength of complainant union.

3. Respondents are in the habit of engaging employees on casual, temporary, contract basis for years together though the posts on which the employees are appointed are permanent and perenial nature. The Respondents are exploiting the employees by keeping them as badli, casual or on contract basis with an intention to deprive them from legitimate right of permanency and consequential benefits thereof. The provisions of Industrial Employment Standing Orders Act, 1946 and rule 59 are applicable to Respondents. Therefore, as per provisions of clause 4(c) of model standing orders the Complainants Nos. 2 and 3 are entitled for permanency because they have worked continuously for more than 240 days during the period preceding 12 calender months. But the Respondents have continued Complainants Nos. 2 and 3 as badli/temporary for about 2 years. Respondents have terminated the services of Complainants Nos. 2 and 3 with effect from 31st August 1991. The posts on which present Complainants Nos. 2 and 3 were appointed are of permanent and perenial nature. Complainants were in continuous employment of the Respondents, for 2 years without any break. Termination of services of Complainants Nos. 2 and 3 are in gross violation and in breach of provisions of Sec. 25-F and 25-G of ID Act. Provisions of Chapter VB of ID Act are applicable to the Respondents establishments because they have employed more than 100 employees, therefore, it was necessary to obtain prior permission from the appropriate Government before retrenchment, as required under Sec. 25-N of ID Act. By not making Complainants Nos. 2 and 3 permanent though continuously worked for more than 240 days and terminating their services without compliance of mandatory provisions, this action of Respondents covered under item 6 and 9 of Sch. IV of the Act, hence filed the present complaint.

4. The complaint is strongly oppossed by Respondents on various grounds stated in their written statement Exh. C-3. It is contended by Respondents that services of Complainants Nos. 2 and 3 come to an end on 31st August 1991, therefore, present complaint ought to have filed within a period of 90 days from the date of cause of action and failure to do so, complaint is barred by limitation. They have further stated that the appointments of Complainants Nos. 2 and 3 were made in exigency and by way of special requirement to meet temporary increased work load. According to Respondents, different centres argound the world that larger international carrier like Air India, which is closely connected to Govt. can offer most safest and most reliable security services. According to the experience of Respondents, direct security through their own employees has offered to the independents security services through Air India, they decided at the higest policy making level to entrust all security requirements to Air India Corporation. Therefore, the requirements or need for the security staff members, who had been hired purely on temporary basis, their services were not required as the work of security has been handed over to Air India.

5. Due to the disturbed situation in Gulf region and because of alert messages received from different centres around the world, additional security measures are taken in all areas and thus the appointments of Complainants Nos. 2 and 3 were made. In fact, the Respondents during the period August, 1989 and September 1991 and thereafter received several highly confidential bulletins and information in the matter of the security alerts. The magnitude of security problems faced by the Respondents is much beyond its capacity to deal with through directly employed staff, therefore, feel it necessary to engage Air India agency for ressolving this problem being a high power independant agency. The services of Complainants Nos. 2 and 3 were hired for a fixed period of 2 years because of exigency and in compelling circumstances, but thereafter the security work is now being done by Air India Corporation. It is denied by the Respondents that they are engaged in any unfair labour practice as alleged.

6. On the basis of pleadings of the parties, my Learned Predecessor was pleased to frame following issues to which I have noted my findings :—

Issues	*Findings*
(1) Whether the Complainant union has proved that the Respondents have committed unfair labour practices under items 6 and 9 of Schedule IV of the M.R.T.U. and P.U.L.P. Act, 1971 ?	No
(2) Whether the Complainants are entitled to any reliefs as prayed for in the main complaint ?	No
(3) What orders ?	Complaint is dismissed.

Reasons

7. In order to meet serveral legal objections raised by the Respondents, it becomes necessary to look into the points of limitation, jurisdiction, applicability of model standing orders and the provisions of Bombay Shops and Establishments Act. Let us take the first legal point of limitation which touches to the root of present complaint. Admittedly, Complainants Nos. 2 and 3 were appointed as security guards by letters dated 31st August 1989 for the period of 2 years. The appointment letters of Complainant Nos. 2 and 3 are placed on record. The appointment letter of Complainant No. 3 is at Exh. U-9. The terms and conditions of appointment letters of Complainants Nos. 2 and 3 are identical. As per clauses Nos. 8, 9, 10 and 11 of appointment letters of Complainants Nos. 2 and 3 Exh. U-9, their employment was for a period of 2 years and their services will stand terminated on expiry of said 2 years *i.e.*, on closing of hours of shift of Complainants Nos. 2 and 3 on 31st August 1991. In clause 10 of appointment letters referred above, mention their service being not permanent, the company shall terminate the same at any time during period of said 2 years without assigning any reason and with a notice of 30 days or wages in lieu thereof. Thus, it

is clear that the period of employment was specifically stipulated in the appointment letters of Complainants Nos. 2 and 3. Accordingly, the services of Complainants Nos. 2 and 3 came to be terminated with effect from 31st August 1991. The present complaint is filed on 26th November 1991, it means present complaint is filed within a period of 90 days after termination of services of Complainants Nos. 2 and 3. According to Respondents, when the grievances of Complainants is of not making them permanent as soon as they completed 240 days of continuous service, from that date the cause of action arose for such relief, means Respondents objecting maintainability of present complaint on the ground of limitation because according to them, delay is caused for filing the complaint for about 14 months as present complaint should have been filed in the month of July, 1990 *i.e.* within 3 months from the date of completion of 240 days of continuous service by Complainants Nos. 2 and 3. It is not necessary to file complaint under item 6 of the Schedule IV of M.R.T.U. and P.U.L.P. Act as soon as employee/workman completes 240 days continuous service. Therefore, I do not find any force in the objection raised by Respondents to the maintainability of present complaint on the point of limitation. Complaint is filed within 90 days from the date of termination of services of Complainants Nos. 2 and 3, therefore, it is within the limitation. But the question is as to whether present complaint itself is tenable before Industrial Court after termination of services of Complainants Nos. 2 and 3 and when the privity of contract between the parties does not exist. This point is taken for decision in the judgement at appropriate stage. The objection being restricted at this juncture is only to consider whether present complaint is barred by limitation, to that extent, my answer to said objection raised by Respondents to the limitation is that Complainants Nos. 2 and 3 have filed this complaint within limitation, therefore, the Court can entertain the same.

8. The second legal objections raised by Respondents is that this Court has no jurisdiction to entertain the complaint. To substantiate this objection, Respondents are taking the help of Sec. 5, 7 and item 1 of Schedule IV of M.R.T.U. and P.U.L.P. Act. Provisions of Sec. 5 of said Act gives the duties of Industrial Court and Sec. 7 relates to the duties of Labour Court. As per provisions of Sec. 7 of said Act, it shall be the duty of Labour Court to decide complaints relating to unfair labour practices described in item 1 of Sch. IV and to try offences punishable under this Act. No doubt, complaint is not filed under item 1 of Sch. IV of the Act. But according to Respondents, under the garb of provisions of items 6 and 9 of Sch. IV of the Act, Complainants are trying to seek relief under the said provisions without mentioning it specifically in the complaint. Admittedly, when present complaint is filed, on that day Complainants Nos. 2 and 3 were not in employment of the Respondents because their services have already been terminated with effect from 31st August 1991. Learned Advocate for Respondents have vehimently argued on the point of juridsiction of this Court as the Complainants Nos. 2 and 3 after termination of their services filed this complaint for permanency. Learned Advocate for Respondents has placed reliance on the case of Dilip Indrabhanji Wawande *Versus* Industrial Court, Nagpur and others reported in 1995 II CLR 897 Bombay, wherein held that there is no dispute that the jurisdiction to try the dispute as regards the termination is with the Labour Court, having regard to the provisions of Sec. 7 of the M.R.T.U. and P.U.L.P. Act. Further reliance is placed on the case of A-Z (Industrial) Premises Co-op. Society Limited *versus* A. T. Utekar and others reported in 1997 II CLR 1033 Bombay, wherein held in Para 2x,—

> "The duties of Industrial Court ate provided in Sec. 5 of the Act which does not include the duty to decide the complaint relating to unfair labour practices described in item 1 of Sch. IV. The complaint filed by the employees under item 9 of Sch. IV, of course, can be tried by Industrial Court but, in no case, the Industrial Court try and decide the complaint relating to unfair labour practices described in item 1 of Sch. IV. The Industrial Court, therefore, has no jurisdiction to decide the present complaint made by the employees relating to unfair labour practice described in item 1 of Sch. IV. The said prayer is the main and substantial prayer. In this view of the matter, the Industrial Court cannot be said to be justified in relying upon the general proposition that where there are two or more items involved in any proceedings and out of which one of the items is triable by superior Court, then in such circumstances, the entire proceedings shall be heard and decided by superior Court."

Having been consideted the ratio laid down in above referred cases, it is clear that once the dispute is regarding termination of service, definitely it falls under item 1 of Sch. IV of the Act, upon which the Industrial Court has no jurisdiction to decide it. Learned Advocate for Respondents has further advanced his arguments on the basis of the ratio laid down in the case of Pepsico India Holdings Pvt. Ltd. *Versus* Noshir Elavia and others reported in 2002 I CLR 953 Bombay, whereinheld in Para 14,—

> "However, in the present case, although there may have been a breach of the standing orders applicable to the establishment, the result is that there has been a termination of services of the employee. Consequently, the reliefs which can be claimed is of reinstatement with continuity of service and full back wages. This is a relief which can be granted by the Labour Court under item 1 of Sch. IV of the Act. In fact, under Sec. 7 of the Act, all complaints relating to unfair labour practices described in item 1 of Sch. IV of the Act are to be tried exclusively by the Labour Court."

But, according to Complainants, they are not invoking the provisions of item 1 of Sch. IV of the Act and their case is entirely based on the provisions of items 6 and 9 of Sch. IV of the Act, therefore, this Court has jurisdiction to entertain present complaint. Learned Advocate for Complainants has placed reliance on the case of Association of Engineering Workers *Versus* A.T.V. Limited and others reported in 2002 II CLR 387 Bombay, wherein held in Para 4,—

> "A conjoint reading of Sections 5, 7 and 32 of the Act 1971 would make it clear that, though for the purpose of exercising initial jurisdiction into substantive complaint, the jurisdiction have been compartmentalized inasmuch as the Labour Court has no jurisdiction to entertain complaints other than complaints falling under item 1 of Sch. IV of the Act and consequently, conversely the Industrial Court has been given powers to entertain complaints in all other matter it does not mean that the Industrial Court, while exercising jurisdiction within the sphere legitimately assigned to it, cannot pass an order which is required to be done in the interest of justice."

Further held in supra,—

> "Therefore, the legal position is now well settled that it was within the jurisdiction of the Industrial Court to adjudicate the entire issue in respect of the alleged illegal termination of 23 workers in this case and the reliance put on the ruling in the case of A-Z (Industrial) Premises Co-op. Society Limited case (supra), holding that Industrial Court has no jurisdiction in such *vases* is unjustified and therefore, note is required to be taken of the situation."

It is pertinent to note that in the present complaint there is no challenge to the letter of termination and the Complainants are not claiming relief of reinstatement, but the Complainants Nos. 2 and 3 are out of employment from 31st August 1991 still they are claiming benefits of items 6 with item 9 of Sch. IV of the Act, *i.e.* for making them permanent. Therefore, the Industrial Court has jurisdiction to entertain present complaint filed under items 6 and 8 of Sch. IV of M.R.T.U. and P.U.L.P. Act.

9. The stand taken by Respondents that model standing orders are not applicable to their establishment, therefore, Complainants cannot claim benefits of deeming provisions of clause 4(c) of model standing orders. Clause 4(c) of model standing orders says,—

> "A badli or temporary workmen who has put in 190 days' uninterrupted service in the aggregate in any establishment of seasonal nature or 240 days "ununterrupted service" in the aggregate in any other establishment, during a period of preceding 12 calender months, shall be made permanent in that establishment by an order in writing signed by the Manager, or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calender months."

According to Respondents, as per Sec. 4 of Bombay Shops and Establishments Act, 1948, their establishment is exempted from applicability of the provisions of Bombay Shops and Establishments Act, 1948. The provisions of Sec. 4 of Bombay Shops and Establishments Act, 1948 says ,—

> "Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Sch. II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule."

As the reference of Sch. II of Bombay Shops and Establishments Act is in Sec. 4 of said Act, it is necessary to go through the said Schedule. As per Sch. II of said Act, the offices of air services company has mentioned at Sr. No. 6(c) in said Schedule are exempted from applicability of the provisions of Bombay Shops and Establishments Act. Learned Advocate for Complainants has placed reliance on the case of Vasudeo Anant Kulkarni *Versus* Executive Engineers M.S.E.B. and others reported in 1994 II CLR 172 Bombay, wherein held in Para 24,—

> "It is, therefore, not necessary for an employee of an establishment to which the Bombay Shops and Establishments Act, 1948 applies to prove that he is a workman within the meaning of Workmen's Compensation Act, 1923, because Sec. 38-A itself contains a deeming provision. In the given case, therefore, the view taken by the authority below has fallen into a legal error in taking into account the definition of the "workman" as contained in Sec. 2(1)(n) of Workman's Compensation Act in isolation and in regard to the provisions contained in Sec. 38-A of the Bombay Shops and Establishments Act, 1948."

Further, Learned Advocate for Complainants has placed reliance on the case of Indian Tobacco Co. Ltd. Nagpur *V/s.* Industrial Court, Nagpur and others reported in 1995 I LLJ 582 S. C., wherein held in Para 10 that,—

> "Thus it is held that the provisions of Sec. 38 of the Shops Act applied to all establishments as if Industrial Establishments irrespective of the number of persons employed therein and the standing orders would apply instantly providing a period of probation of 3 months only. It, thus, appears that to us that the High Court was right in importing the applicability of the standing orders Act and the standing orders to enable the Respondents to ripen his period of probation to one of gratuity regularity after the expiry of three months of successful completion."

The instant case is not relating to the period of probation but in fact the controversy is involved to applicability of the provisions of clause 4(c) of model standing orders. Learned Advocate for Complainants has vehimently argued that irrespect of employee or employees engaged in establishment, the provisions of Bombay Shops and Establishments Act are applicable to the establishments and also employees are entitled to take benefits of model standing orders.

10. The Learned Advocate for Respondents has canvassed his arguments in the light of the observations made by the Hon'ble High Court in the case of Punjab Krishi Vidyapeeth Akola *Versus* General Secretary, Krishi Vidyapeeth Kamgar Union and others reported in 1994 I CLR 913 Bombay, wherein held in Para 7,—

> "One thing is, therefore, certain that merely because a particular organization or a particular employee has been employed workers as badlis, casuals or temporaries and has continued them years together by itself would not bring him into the clutches of the unfair labour practices described in above. The object of the employer in employing the workers as such for years together should be to deprive them of the status and benefits of permanency, Unless, therefore, there is a finding that the employer has deliberately kept on employing the workers with this object, the employer could be held guilty of this unfair labour practice."

From the ratio laid down in above referred case, it is clear that the object of employer in employing workmen badlis, casuals, or temporaries or continuing them years together must be depriving them of the status and priviles of permanency. Learned Advocate for Respondents during

course of his arguments has given more emphasis to the provisions of Sec. 2(oo)(bb) of Industrial Disputes Act, 1947 which are relating to retrenchment means the termination by the employer of services of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action but does not include voluntary retirement of workman or retirement of workmen on reaching the age of superannuation if the contract of employment between employer and workman concerned a stipulation in that behalf, or termination of the services of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf thereon. To substantiate the argument, Learned Advocate for the Respondents has placed reliance on the case of Harmohindersingh *Versus* Kharga Canteen, Amballa Cantt. reported in 2001 II CLR 927 S.C. wherein held in Para 15 that,-

"The argument on the basis of Sec. 25-F is equally misconceived. This Section deals with conditions precedent to retrenchment of workmen. It would not apply to Para 3-A because of the definition of retrenchment in Sec. 2(oo)(bb), which expressly excludes "termination of service of a workman as a result of the non renewal of the contract of employment between the employer and the workman concerned on its expiry of such contract being terminated under a stipulation in that behalf contained therein." Contracts of service for a fixed terms are, therefore, excluded."

In short, according to the Respondents, when the services of Complainants Nos. 2 and 3 were hired for a specific period on contract basis and as soon as that period was over and contract was not renewed, this does not mean to retrenchment because such cases are covered under Sec. 2(oo)(bb) of Industrial Disputes Act, 1947.

11. By way of reply, the Learned Advocate for Respondents is taking help of provisions of clause 4(c) of model standing orders and in support of his arguments placed reliance on the case of Saudi Arabian Air Lines *Versus* Ashok Margovind Panchal and others reported in 2002 III CLR 743 Bombay, wherein held in para 9 that,—

> "Applying the aforesaid tests aptly prescribed by the Learned Labour Judge to the present case, the conclusion is inescapable that the work continued and the post of security guard was of a permanent nature and therefore, there was no application of Sec. 2(oo)(bb) of the I.D. Act."

Learned Advocate for the Respondents has pointed out that the judgement referred above is stayed by Hon'ble Division Bench of Bombay High Court, therefore, accoring to Respondents, presently no assistance can be taken of the ratio laid down in above cited case. During the course of arguments, when this point was raised by Learned Advocate for Respondents, it was not controverted by the Learned Advocate for Complainants. Further reliance is placed by Learned Advocate for Complainants on the case of Alexander Yasudas Maikel *Versus* Perfect Oil Seals and IRP and others reported in 1995 I CLR 942 Bombay, wherein held in Para 3,—

> "In my view, the petitioner did all that was legally possible for him to do and has sufficiently discharged the burden of showing that he had worked for more than 240 days during the relevant period. I am, thereof, of the view that the petitioner had one year's continuous service within the meaning of Sec. 25-B of the I.D. Act on 31st May 1986 when his service was terminat."

But in the instant matter, the Complainants are not claiming the benefits of Sec. 25-B of I.D. Act. On the contrary, taking help of the provisions of Sec. 2(oo) of I.D. Act and clause 4(c) of model standing orders. In fact, Sec. 25-B of I.D. Act giving the definition of "continuous service" and how it is computed. But in the instant case, Complainants Nos. 2 and 3 were in service of Respondents for a period of 2 years as per letters of their appointment. At the fag end of arguments, Learned Advocate for Complainants also submitted that the services of Complainants Nos. 2 and 3 have been terminated without compliance of provisions of Sec. 25-F of I.D. Act and no legal dues are paid. When the services of Complainants Nos. 2 and 3 were hired or they were engaged for a stipulated period and said Complainants never raised an objection to the terms and conditions of

the contract between them and the Respondent management, till the date of termination of their service, therefore, the questions remained un-answered as to whether the Respondents are liable for their action of termination of services of Complainants Nos. 2 and 3. As per the terms and conditions stipulated in the contract, services of Complainants Nos. 2 and 3 have been terminated. Therefore, the action of Respondents of termination of services of Complainants Nos. 2 and 3 cannot be said to be the unfair labour practice. When the parties are bound themselves with the terms and conditions of contract, certainly they are responsible and liable for performing of their part of the contract. After the contract is complete, services of Complainants Nos. 2 and 3 have been terminated and in such case, in my considered view, does not amount to unfair labour practice, as alleged, against the Respondents. There is no sufficient evidence on record that the work which was allotted to Complainants Nos. 2 and 3 is available and said work is claiming by the Complainants instead of giving it to a fresh security guards. In fact, case of the Complainants Nos. 2 and 3 is for permanency. Having been taken into account oral and documentary evidence in totally, in my considered view, the Complainants have failed to prove their grievances that the Respondents engaged in unfair labour practices covered under items 6 and 9 of Sch. IV of M.R.T.U. and P.U.L.P. Act, 1971. In this back ground of the matter, present complaint deserves to be dismissed as per order passed below :—

Order

Complaint (ULP) No. 1615 of 1991 is hereby dismissed. No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 19th December 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) No. 1036 of 2001.—Shri Aroon Suvarna, 1/16 Forget Jersan, R. No. 46/47, Fourth Floor, Dr. Mangeshkar Road, Mumbai 400 036—*Complainant—V/s*—Wimco Limited, Indian Mercamtile Chambers, Ramjobhai Kamani Marg, Ballard Estate, Mumbai 400 038. (2) Mr. A. V. Budhkar, Genereal Manager, HR and IR, Wimco Limted, Ballard Estate, Mumbai 400 038. (3) Mr. T. V. Sundaram, General Manager, Wimco Limited, Chennai Factory, 412, TH Road, Tiruvottiyur, Chennai 600 019.—*Respondents.*

In the matter of complaint of unfair labour practices under items 1, 3, 7, 9 and 10 of Sch. IV of the M. R. T. U. and P. U. L. P. Act, 1971.

PRESENT.—Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.—Ms. K. Vashi, Advocate for Complainant.

Mr. P. N. Salgaonkar, Advocate for Respondents.

Judgement and Order

(Dated the 18th December 2003)

This complaint is filed for unfair laboour practices under items 1, 3, 7, 9 and 10 of Sch. IV of M. R. T. U. and P. U. L. P. Act. Complainant is claiming that Respondents engaged in unfair labour practices covered under items 1, 3, 7, 9 and 10 of Sch. IV of M. R. T. U. and P. U. L. P. Act, by not reinstating Complainant and failure to pay him full back wages.

2. Facts in brief of complaint are as under : Complainant Aroon Suvarna was in service of Respondents since last 30 years. Respondents have forcibly transferred the services of Complainant from Mumbai to Chennai factory without assigning any reason by transfer letter dt. 22nd March 2001 and forced him to report for work at Chennai factory, Complainant is suffering from medical illness since last few years. Complainant is the resident of Mumbai and only earning member having no financial support. Complainant is undergoing medical treatment at Mumbai of Bombay Hospitals and doctors advised him to take rest. Complainant was a committe member of WIMCO employees union who has taken active part in activities of the union. Respondents in order to prevent Complainant from doing activities of the union has been dellberately transferred to Chennai factory with *malafide* intention. Respondent No. 3 as per letter dated 25th August 2001 will not entertain any communication sent by him and Complainant shall communicate his difficulty to Chennai factory.

3. Respondents as per their letters dated 29th August, 2001 and 7th September 2001 pressurised the Complainant that he should report for duty at Chennai factory without conisdering illness of Complainant. Because of such harassment from the Respondents, the Complainant under compelling circumstances whatever proposal was submitted by Respondents signed by him hastily without knowing consequences of it. In fact, Complainant had been misguided by officers of the Respondents and by force obtained his signature on the propesal, taking advantage of illness of Complainant. Therefore, the action of Respondents amounts to unfair labour practices as the Complainant has been forcibly resigned by way of victimization, therefore, entitled for reinstatement in service and back wages.

4. Respondents have strongly resisted the claim of Complainant for his reinstatement in service and back wages, on serveral gounds as stated in their written statement Exh. C-2. It is contended by Respondents that by letter dated 22nd March 2001 Complainant was transferred from Mumbai to Chennai factory as the services of Complainant are transferable as per terms and conditions of his appointment letter. But the Complainant tried to avoid to join at the transferred place and started applying and availing sick leave and privileged leave and ultimately filed a complaint (ULP) No. 266/2001 before Industrial Court, Mumbai for staying the effect and operation of the transfer order dated 22nd March 2001. In Complaint (ULP) No. 266/2001 interim reliefe was sought by Complainant but the Industrial Court declined to stay the action of Respondents of transferring the Complainant to Channai factory. Therefore, Complainant had filed Writ Petition No. 1500/2001 before Hon'ble High Court challenging the order passed by Industrial Court on the interim relief application, but that Writ Petition also came to be rejected. Despite of this, the Complainant was reluctant to join his duty at Chennai factory.

5. Thereafter Complainant had field Review Petition No. 29/2001 in Writ Petition No. 1500/ 2001 before Hon'ble High Court under which the parties arrived at the settlement and accordingly a consent term was signed by Complainant and Respondents company before Hon'ble High Court on 13th September 2001 on the basis of which the High Court was pleased to pass order in consent terms. As per consent trems agreed between the parties to the review petition No. 29/2001, before the Hon'ble High Court Complainant had agreed that he will tender his resignation on receipt of lumpsum amount of Rs. 1,75,000 in addition to his other legal dues such as gratuity, provident fund, bonus, encashment of leave etc. and that should be made within 90 days from the date of the order. Pursuant to that consent terms, the Complainant through his union made an application before the Industrial Court, Mumbai, in complaint (ULP) No. 266/2001 for deletion of his name from said complaint and also submitted a letter of resignation dated 17th September 2001 which accepted by the Respondent company as per their letter dated 26th September 2001. In the letter dated 26th September 2001, the Respondent company had asked the Complainant to collect his legal dues from the office prior to 30th September 2001, but Complainant once again field present complaint after receipt of entire legal dues. It is denied by Respondents the allegation of forcibly transferring the Complainant from Mumbai to Chennai factory as well as the allegation of compelling the Complainant to tender his resignation taking advantage of his illness. It is contended by Respondents that nowhere the Complainant has pleaded in complaint (ULP) No. 266/2001 that he was forced to tender his resignation by taking advantage of his illness. It is denied by Respondents that the Complainant was transferred *malafidely* from Mumbai to Chennai factory. Lastly contended by Respondents that the Complainant is not entitled for reinstatement and back wages as he has resigned his job and collected entire legal dues.

6. On the basis of pleading of the parties, following issues are framed to which I have noted my findings :-

Issues	*Findings*
(1) Does the Complainant employees prove that the Respondents have engaged in unfair labour practices, as alleged ?	No.
(2) Is the Complainant employee entitled to any relief/ reliefs ?	No.
(3) What orders ?	Complaint is dismissed

Reasons

7. Substantial relief claimed by Complainant is of reinstatement with full back wages. This relief is denied by Respondent on the basis of the consent terms filed in review petition No. 29/2001 before Hon'ble High Court, Bombay. Xerox copy of order dated 13th September 2001 passed by Hon'ble High Court in review petition No. 29/2001 is placed on record *vide* Exh. C-4. As per consent terms filed in said review petition the Complainant had agreed to resign from service of the Respondent company with effect from 17th September 2001 which was accepted on the same day, and in the result the transfer order dated 22nd March 2001 stands withdrawn as well as departmental enquiry initiated against the Complainant by Respondent company. On account of resignation tendered by Complainant he had received Rs. 1,75,000 by way of lumpsum compensation as per consent terms. It was also agreed between the parties to pay other legal dues in addition to Compensation such as gratuity, provident fund, bonus, encashment of leave etc. to the Complainant. It is not disputed that Complaint (ULP) No. 266/2001 was filed by Complainant challenging the action of Respondents of transferring him from Mumbai to Chennai, but this action was upheld by the Industrial Court, Mumbai, as well as Hon'ble High Court. The subject matter of present complaint is entirely different as the relief sought thereunder is of reinstatement with back wages. Thus, the cruck of present complaint is as to whether Complainant is entitled to reinstatement with back wages though he had tendered his resignation as per the consent terms and also received compensation and other benefits.

8. Complainant Aroon Suvarna examined himself and through his oral evidence tried to set up a new story as to under which circumstances he was compelled to tender the resignation. Complainant has made a statement on oath that he had undergone the medical treatment for artillary in the abdomen got enlarged and every day required to take medicines, therefore, was in need of amount to meet out the medical expenses, hence there was no alternative but to tender resignation and take final dues. These facts are not mentioned in Complainant (ULP) No. 266/2001 or in review petition No. 29/2001. In the cross-examination, Complainant has admitted the fact of tendering his resignation as per settlement/consent term filed before Hon'ble High Court and neither before the Industrial Court not before Hon'ble High Court, the case was made out about his illness and in compelling circumstances accepted the term of tendering resignation Complainant has admitted in his cross-examination that amount of Rs. 1, 75,000 was received by him towards compensation as per the consent terms, Rs. 1,82,000 accepted towards gratuity and Rs. 33,000 towards leave encashment. But according to Complainant, he has not received some amounts towards bonus and provident fund. No doubt, Complainant is entitled to the amount of provident fund from the competant authority and for that he must take appropriate steps. In respect of unpaid bonus amount if any remained, on statisfaction of Respondents, he may be entitled. Learned Advocate for Complainant has submitted that present Complainant is expired during the proceedings, therefore, whatever amount remained to be paid to the Complainant, the said amount be paid to the legal heirs of deceased Complainant. Complainant has examined witness Vijayan, a co-worker, who was also transferred alongwith Complainant. Witness Vijayan has not stated on the issues involved in the complaint, but he has narrated as to how he was transferred alongwith Complainant and about his union activities and refusal of promotion.

9. The Respondent has examined only witness Narayanan through whom brought on record the fact of transfer of Complainant from Mumbai to Chennai and said action was challenged by him in complaint (ULP) No. 266/2001. Witness Narayanan has stated in respect of sattlement arrived at between the Complainant and management of respondents and in pursuance of said settlement, the Complainant had tendered the resignation and accepted the entire dues. When the Complainant was suffering from disease then why he failed to mention this fact in complaint (ULP) No. 266/2001 and the proceeding before the Hon'ble High Court. The best opportunity was available for Complainant to disclose his difficulty as to how he was unable to join his duty at the transferred place as he was suffering from serious disease. The present complaint is filed for the relief of resinstatement in which Complainant is making reference of his disease and to meet out medical expenses he was in need of amount, therefore, under compelling circumstances tendered the resignation and accepted his legal dues. Complainant has failed to prove that he was pressurised or compelling circumstances had tendered the resignation. Once Complainant has tendered the resignation of his job, which was accepted by the Respondent management, there is no option for Complainant to say that he is entitled for the relief or reinstatement. It is pertinent to note that most of the legal dues have already been received be Complainant and if any legal dues remained to be paid, in due course, certainly the Complainant is entitled too. But the Complainant has miserably failed to prove that he is entitled for the relief of reinstatement. In this view of the matter, I find no substance in the complaint which deserves to be dismissed as per order passed below :—

Order

Complaint (ULP) No. 1036 of 2001 is dismissed, No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 18th December 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.

IN THE INDUSTRIAL COURT AT MUMBAI

REVISION APPLICATIONS (ULP) Nos. 157, 159, 163 and 169 OF 2000, REVISION APPLICATION (ULP) Nos. 157/2000.—Shri A. A. Khele, Project Manager, B. G. Shirke Constructions Tech. Ltd., Malad Charkop Link Road, Opp. Ganesh Nagar, Kandivali, Mumbai. (2) B. G. Shirke Constructions Tech. Pvt. Ltd., 72-76, Mundhawa, Pune 411 036. (3) B. G. Shirke and Company (Civil Division), Pune 411 036—*Applicants—V/s.*—Mr. N. R. Prakash, Tenement No. 606. Bidg. No. 606, 6th Floor, B. G. Shirke Construction Technology Ltd., MHADA Quarters, Pratiksha Nagar, Sion-Koliwada, Mumbai 400 022—*Opponent.*

REVISION APPLICATION (ULP) No. 159 OF 2000.—(1) Shri D. P. Patil, Project Manager, B. G. Shirke Construction Tech. Ltd., Navi Mumbai. (2) B. G. Shirke Construction Tech. Pvt. Ltd., Pune 411 036. (3) B. G. Shirke and Company (Civil Divn.), Pune 411 036—*Applicants–Versus*—Mr. Ajaykumar Gopalan, C/o. B. G. Shirke Construction Tech. Ltd., Bldg. No. 7, Flat No. 308, MHADA, Pratiksha Nagar, Mumbai 400 022.—*Opponent.*

REVISION APPLICATION (ULP) No. 163 OF 2000.—(1) Shri N. V. Kudale, Ara Manager, B. G. Shirke Construction Tech. Ltd., Antop Hill, Wadala, Mumbai, (2) B. G. Shirke Construction Tech. Pvt. Ltd., Pune 411 036, (3) B. G. Shirke and Company, Pune 411 036—*Applicants—Versus*—Mr. Narsimharaju B. N., C/o. B. G. Shirke Construction Tech. Ltd., Transit Camp, Bldg. No. 918. Room No. 207, Behind PMGP Quarters, Mankhurd, Mumbai 400 043—*Opponent.*

REVISION APPLICATION (ULP) No. 169 OF 2000.—(1) Shri N. V. Kudale, Area Manager, B. G. Shirke Construction Tech. Ltd., EPPL Project, Antop Hill, Mumbai, (2) S. G. Shirke Construction Pvt. Ltd., Pune 411 036, (3) B. G. Shirke and Company (Civil Div.), 72-66, Mundhwa, Pune 411 036—*Applicants—Versus*—Mr. B. G. Jawali, Pratiksha Nagar, Bldg. No. 7/710, Mhada Housing Project, Sion, Mumbai .—*Opponents.*

In the matter of applications under Section 44 of the M. R. T. U. and P. U. L. P. Act, 1971.

PRESENT.—Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.—V. H. Kantharia : Advocate for Applicants.

Shri Dande, Advocate for Opponents.

Common Judgment and Order

(Dated the 25th November 2003)

1. These four revisions are filed by Applicants for challenging orders passed by XI th Labour, Court, Mumbai on application Exh. U-2 and application Exh. C-4 filed in Complaints (ULP) Nos. 591/2000, 594/2000, 597/2000 and 599/2000 respectively. These 4 revisions *i. e.* 157/2000, 159/2000, 163/2000 and 169/2000 are disposed by this common Judgement and order because facts and contraversy involved therein are identical.

2. The facts in brief of revisions are as follows :—Revision Appln. (ULP) No. 157/2000 is filed by Shri A. A. Khole Project Manager and 2 others against an employee N. R. Prakash Revision Application (ULP) No. 159/2000 is filed by D. D. Patil, Project Manager and 2 others against an employee Ajaykumar Gopalan, Revisons Applications (ULP) Nos. 163/2000 and 169/2000 are filed by Shri N. V. Kudale, Area Manager and 2 others against the employees Narsimharaju B. N. and B. G. Jawali. In all 4 revisions common order was passed below application for interim relief Exh. U-2 and filed in Complaints (ULP) Nos. 591, 594, 597 and 599/2000, dated 11th September 2000 is the impugned as well as the order passed below application Exh. C-4, dated 5th October 2000.

3. The order on interim relief application Exh. U-2, dated 11th September 2000 is challenged by present Applicants on the ground that it is bad in law and in due haste without application of mind, the Learned Labour Judge has passed said orders granting interim relief in the nature of final relief on the first day of hearing without giving an apportunity of heraring to Applicants. Another order dated 5th October 2000 passed below application Exh. C-4 is impugned as it is perverse and illegal.

4. By order dated 11th September 2000 the Learned Labour Judge was pleased to restrain the Applicants temporarily from terminating services of Opponents without following due process of law pending final disposal of main complaint on merits, and by order on application Exh. C-4, dated 5th October 2000 confirmed the order dated 11th September 2000 on Exh. U-2.

5. Heard the Learned Advocates for Applicants. Opponents and their Advocate not attending the revisions since long, though called several times but remained absent.

6. following points arise for my determination :—

Points	*Findings*
(1) Whether Applicants have established that orders dated 11th September 2000 and 5th October 2000 under challenged in revisions are passed in due haste without application of mind by Learned Labour Judge, therefore, it is liable to be quashed and set aside ?	(1) No.
(2) Whether Applicants have proved that orders impugned suffers with perversity, illegality and arbitrariness therefore interfernce is called for ?	(2) No.
(3) What Order ?	(3) Revn. Applications dismissed.

Reasons

7. The Original Complainants in Complaints (ULP) Nos. 591/2000, 594/2000, 597/2000 who are the Opponents in present revisions filed those complaints against the Rspondents who are Applicants in the present revisions are claiming that the Applicants engaged in unfair labour practices covered under item 1 (*a*), (*b*) and (*d*) of Sch. IV of M. R. T. U. and P. U. L. P. Act, 1971. By an interim relief application Exh. U-2 filed in these Complaints seeking relief that pending hearing and final disposal of the Complaints direct the Applicants, their servants and agents not to terminate the services of Opponents without following due process of law and to maintain status quo in respect of wages and service conditions. In fact, total 12 individual Complaints are filed before XIth Labour Court, Mumbai, out of which only 4 employees are challenging the orders passed in aforesaid Complaints on interim relief applications Exh. U-2 and applications Exh. C-4 on 11th September 2000 and 5th October 2000. From the record it shows that the grievance of Opponents before the Labour Court was that the Applicants are not allowing them to resume their duty therefore apprehension that their services are likely to be terminated without following due process of law by way of victimisation and in colourable exercise of employers right. Therefore, pending hearing and final disposal of the Complaints relief against the Applicants sought to restrain them from terminating services without following due precess of law.

8. After the Complaints filed by Opponents, show cause notices were issued against the Applicants returnable on 11th September 2000. By order passed below application Exh. U-7 Hamdasta of said notice was allowed to be served on the Applicants. Though the matter was adjourned, the Learned Labour Judge was pleased to issue show cause notice in view of caveat filed by Applicants *vide* Caveat No. 823/2000. The Opponents have filed affidavits Exh. U-7 and U-8 stating therein that they had been to the residence of the Applicants No. 1 for getting served notice issued by the Court to the Applicants at their Office on 9th September 2000 but Applicant No. 1 refused to accept the notices. After filing the said affidavits, the Learned Labour Judge was pleased to call the Applicants till 4-00 p. m. but the Applicants did not appear. Thereafter after hearing Opponents on interim relief application Exh. U-2 was passed on 11th September 2000 by XIth Labour Court, Bombay. It is mentioned in said order dated 11th September 2000 that there is every apprehension in the minds of Opponents that their services are likely to be terminated without following due process of law, hence necessary to issue interim direction against the applicanted, otherewise possibility cannot be ruled out of causing irrepairable less to the Opponents. Thus, it is clear that the Learned Labour Jadge was pleased to exercise the discretionery powers in favour of Opponents as convinced with the facts and circumstances and reliefs sought therein considered to be urgent. The Applicants are seeking interference with the orders impugned, means ultimately it would be interference with the discretion exercised by Learned Labour Judge while granting reliefs. Therefore, the burden is on the Applicants to show discretion exercised by Learned Labour Judge either unreasonable or not judicious. It is clear from the orders impugned that the Applicants did not take appropriate steps on the day when the matter was fixed for hearing. Since the first day of hearing, the conduct of Applicants is not fair and they failed to show bonafide as to why they remained absent on the day of hearing the matter. Learned Advocate for Applicants has streneously argued and trying to convince the Court as to how the

order on interim relief application Exh. U-2 passed in absence of Applicants. Further, he urged that Learned Labour Judge should have given an opportunity to hear them and without doing this passed interim order which is in the nature of final order, therefore, necessary to quash and set aside the orders impugned. Bacause of caveat was filed by applicants, the Learned Labour Judge has rightly issued show cause notice instead of passing any order and allowed the Opponents to serve notices by humdast. The Learned Labour Judge has rightly held that there was no reason to disbelieve the facts stated by Opponents in their affidavits in respect of refusal to accept the notices by Applicants. If we consider this conduct of Applicants whether it would be proper to say that the Learned Labour Judge failed to apply mind in cerrect perspective while passing the orders.

9. Learned Advocate for Applicants has tried to demonstrate that the interim order passed on application Exh. U-2 is ineffective because services of Opponents were already been terminated before the date of passing order on application Exh. U-2. If it is so, then in no way the rights of Applicants likely to be prejudiced or may cause any hardship. The question of terminating services as alleged by applicants before passing order on application Exh. U-2 would be the subject matter for consideration while deciding the Complaints on merits. According to Applicants, when they have terminated the services of Opponents following due process of law, then there is no possibility of change in the circumstances, despite of interim orders passed by the Learned Labour Court on interim relief application Exh. U-2. Therefore, an application Exh. C-4 was filed by them to vacate or set aside the order dated 11th September 2000 should have been allowed. It is pertinent to note that by an order dated 5th October 2000 passed below application Exh. U-4, the Learned Labour Judge was not inclined to interfere with its order dated 11th September 2000 On the contrary, the Learned Labour Judge has confirmed its earlier order 11th September 2000, after having been heard both sides. It means after giving an opportunity to the Applicants, the Learned Labour Judge has considered the entire facts and circumstances and any situation subsequently occurred and come to the conclusion that the order dated 11th September 2000 not necessary to stay or vacate but deserves to be confirmed.

10. A party when much cautions about its rights and approaching the Court with a caveat unless affording an opportunity of hearing, he order should be passed by Court in the matter described in the caveat. In view of this, the Learned Labour Judge complied with legal provisions before passing orders on interim relief applications Exh. U-2. The Applicants failed to show their bonafides about their absence on the date of hearing. The Learned Labour Judge has rightly taken the view about *prima facie* case made out by the Oppnents and the balance of convenience lyes in their favour. In the present revisions, Applicants have not succeeded in establishing their grievance that the orders impugned are illegal or suffer with illegality, perversity or arbitrariness. Therefores present revisions does not survive and hence liable to be dismissed.

11. The submission made by Learned Advocate for Applicants for direction to decide the Complaints pending before XIth Labour Court within a period of 6 months is reasonable in view of controversy involved between the parties, It is in the interest of parties to Complaints to get the decision on merits. In this back ground, I proceed to pass following order :—

Order

(1) Revision Applications (ULP) Nos. 157/2000, 159/2000, 163/2000 and 169/2000 are dismissed, with no order as to costs.

(2) The Learned Labour Judge, Mumbai, is hereby directed to dispose of Complaints (ULP) Nos. 591/2000, 594/2000, 597/2000 and 599/2000 on merits within a period of 6 months, from the date of receips of records and proceedings.

P. P. Patil,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 25th November 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 9th November 2003.

EMPLOYEES, INSURANCE COURT, AT MUMBAI

BEFORE SHRI P. B. SAWANT, JUDGE

APPLICATION (ESI) No. 99 of 1992.—M/s. GTC Industries Ltd., Tobacco House, S. V. Road, Vile Parle (W), Mumbai 400 056—*Applicant—V/s*—The Regional Director, E. S. I. Corporation, ESIC Buiding, Colaba, Mumbai 400 005—*Opp. Party.*

In the matter of Application u/s. 75 of the EST Act, 1948.

CORAM.—Shri P. B. Sawant, Judge.

Appearances.—Shri K. S. Desai, Ld. Advocate for the Applicant.

Ms. U. Sawant, Ld. Advocate for the Opp. Party.

Oral Judgment

(Dated the 20th November 2003)

M/s. GTC Industries Ltd. has filed the present Application u/s. 75 of the ESI Act, claiming therein that the order passed by the Regional Director is beyond the period of limitation and that it is bad-in-law and therefore, prayed for quashing the same.

2. The facts which give rise to the present litigation can be stated in nut-shell as below :—

The contention of the Applicant is that it is continuously and punctually depositing the ESI cotribution. However, a letter dt. 4th August 1992 and a show cause notice dt. 5th June 1992 has been served on the Applicant by which an interest to the tune of Rs. 13784 has been claimed and also demanded damages the on the payments which have already made to the Corporation. Being aggrieved and dis-satisfied, the present Application has been filed in this Court. It is the contention of the Applicant that the demand is of a period which is beyond 5 years. The Corporation has for the first time claimed the amount towards interest and damages for the period prior to 5 years. The said claim is time barred and is not maintainable under the Act. Hence, it is prayed that the said claim may please be quashed.

3. It is the further contention that all the payments are made by the Company to the Corporation after proper inspection of the Company's record. It is pointed out that the Cash-Books and Account Books were in the custody of the Excise Department for the period from December, 1978 to June, 1982. This fact was informed to the Corporation. Therefore, the record could not be produced before the Inspector. After receipt of the ledgers, intimation was given to the Corporation for deputing an inspector for verifying the records. No such inspection was carried out. Therefore, the Company is not liable to pay any amount at a late stage. The Applicants have given the details of the payments made for the period in between July, 1975 to June, 1975 and June, 1981 to May, 1982 and July, 1983. as well as the subsequent period. These are the payments made by the Company and demanded by the Corporation by order. The payment made to the Canteen Contractors and Ex-Canteen Contractor has also been submitted in details and ultimately it is prayed that the notcie dtd. 5th July 1982 and order dtd. 28th July 1992 be quashed being void and bad-in-law and also prayed that the Corporation be restrained from instituting any proceedings against the Company.

4. On perusal of the Application and Affidavit and the supporting documents on record, this Court was pleased to issue notice to the Corporation. The Corporation has appeared and filed its Written Statement *vide* Exh. 12, contending that the Application is false and frivolous and the same is liable to be dismissed. It is denied that the Applicant was very punctual and regular in depositing the ESI contributions. It is contened that the Applicant has defaulted in paying the amount as per Regulation 31 within 21 days from the expiry of the wage period. Therefore, on the delayed payments, the Applicant was liable to pay the interest. by letter dt. 5th June 1982, the Corporation had given all the details of the payments. Inspits of that, the interest part has not been paid threfore the notice for paying the damages under Regulation 31-A and 31 (e) of the ESI Regulaions has been issued. It is pointed out that the amended protion of Sec. 77-1 (b) is Applicable for a limited purpose of filing the Application u/s. 75 (2) of the ESI Act. The claim of the Corporation

is for interest and damages u/s. 39 (5) and 85-B for which no time-limit is stipulated. Therefore, the contentions of the Applicant for raising an dispute on account of limitation is not proper. It is denied that the delay has been caused because the Books of Accounts were in the custody of the Excise Department. It is pointed out that the Corporation should have been paid the contribution when they were falling due.The Corporation points out that whatever paymnts made by the Applicant in pursuance to the demand dt. 6th August 1991 was much after the due date prescribed in Sec. 39 reed with Regulation 31. It is pointed out that when the payment was due on or before 20th October 1976, the Applicant has paid the amount with interest on 30th May 1983. The calculation of the damages and interest is on the basis of the computation of days by which the delay has been caused. By demand notice dtd. 26th March 1984, the Applicant has paid the amount, but at a late stage. Therefore, the Corporation has computed the damages and interest on the amount. It is, therefore, contended that whatever demand is made is in conformity with the legal provisions, procedure and threfore the demand pleaced by the Corporation is tenable and maintainable. Therefore, it is prayed that the Application filed by the Applicant is required to be dismissed.

5. On these rival contentions, following issues were framed by this Court *vide* Exh. O-2 and after are re-casted by this Court itself and the Issues are framed as below and my finding thereon, for the reasons given below are as follows :—

ISSUES :—

(1) Does the Applicant prove that the demand of damages and interest claimed by the Corporation is barred by limitation u/s. 77-1 (A) (b) of the ESI Act ?

(2) Does the Applicant prove that the order passed by the competent Authority is not legal and proper ?

(3) Whether the Applicant is entitled for the declaration, as prayed ?

(4) What is the order ?

FINDINGS :—

(1) No.

(2) No.

(3) No.

(4) As per final order.

Reasons

6. *Issue No. 1* :—The question of limitation has been raised *interalia* on the avarments that whatever amount has been claimed by the Corporation falls under the head of Contribution as claimed and since the contribution has been claimed for the year 1976, etc. after prolonged period, the demand cannot be justified on the ground that it is barred by limitation. The overall effect of such submissions clearly envisages that the demand in whatsoever nature has been made by the Corporation, it has to be coupled with the limitation. This particluar aspect has been controverted on account of first the applicability of the limitation, as envisaged u/s. 77 (1) (A) secondly on application of limitation so far as claiming the damages and interest are concerned and thirdly applicability of the limitation only applieng to the point of recovery of contribution as such, Pursuant to these aspects, it is necessary to evaluate the entire matter from the legal and factual point of view to come to a proper conclustion.

7. The basis of the Application is the notice dtd. 4th August 1992 and a show cause notice dtd. 5th June 1992 Both are for claiming the interest and damages respectively. The claim of interest and damages is allways on a delayed payment and obviously this is a penal provision for claiming the damages so that the employers who are not deligent in paying the reguler contribution in time *i. e.* within 21 days from the date it is falling due, then the subsequent events to follow. In that process, the provision of imposition of interest and damages in pursuant to the claim of the Corporation so far as the principal amount is concerned.

8. Chapter IV deals with payment of contribution. Sec. 38 lays down that all employees in the factory or establishment shall be insured. The legislature has taken care of all the employees and thereby used the word "shall", Therefore, it postulates that the employee in whatsoever nature working for the establishment or on the establishment has to be subjected for paying the contributions. in respect of wages or compensation paid to him. On these averments, Sec. 39 deals with the contribution which is payable, shall comprise contribution payable by the employer and contribution payable by the employee. Sub-clause (4) to Sec. 39 has to be read in conjecture with Sec. 38 as it spells out that :—

> "The contributions payable in respect of each (wage period) shall ordinarily fall due on the last day of the (wage period) and where an employee is employed for part of the (wage period) or is employed under two or more employers during the same (wage period), the contributions shall fall due on such days as may by specified in the regulations."

The above provision recognises the status of an employer also. While sub-section (5) (a) to Sec. 39 lays down the provision for paying the simple interest in case failure on the part of the principal employer to pay the contribution. In pursuance of this provision, it is very clear that the Statute itself has recognised the concept of imposition of interest and that of the responsibility of a principal employer to pay the amount of contribution. On this analogy, the provision u/s. 40 is a also required to te taken into consideration and it specifically says that the respondsibility of a prinicpal employer to pay the contribution in the first instance. Therefore, irrespective of the fact of nature of work, the employees are doing or nature of their employment in the establishment, the employer-principal employer has to pay the contributions in the first instance, which can be adjusted thereafter, which entitles it to adjust it from the wages paid to the employees, as mentioned in sub-clause (3) to Sec. 40 u/s 41. the principal employer is authorised to recover the contribution from the immediate employer.

9. This Court has taken an endeavour of all these provisions only with a view to ascertain that the EST Act being a social legislature and is taking care of the weaker section, therfore, recovery of contribution has become a prominent aspect and for that purpose, the principal employer is held responsible for the recovery at the first instance.Therefore, in any case, when the establishment is covered, then the responsibility for collecting the contribution from the wages of the employee and remitting the contribution to the Corporation will be a responsibility of the principal employer. In pursuance of that, if any delay has been caused or if any instance is noticed to avoid paying the contribution, the provision for charging the interest and fixing the damages has been made in this enactment by the legislature. It must be in the mind of the legislature to pay the ailing employers to their taks by using the deterrent provisions against them for the purpose of recovery of the amount.

10. The provisions of Sec. 75 are drafted for the purpose of fixing the prowers of the Insurance Court and also to specify the instances in which matters the Insurance Court shall look into. Therefore, the provisions u/s. 77 has to be read in pursuance of the fact that while filing an Application u/s. 75 for the instances quoted u/s.75 (j) are always sunbjected to a limitation. It the employer come before the Court resisting the order, claiming the contribution from the employer is concerned, then he shall come within a period of 3 years, Sub-clause (b) sub-section (1-A) to Sec. 77 specifically lays down that :—

> ''The cause of action in respect of a claim by the Corporation for recovering the contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time."

Therefore, the question of claim by the Corporation has been explained under the provise clause, which lays down that :—

> "No claim shall be made by the Corporation after five years of the period to which the claim relates."

11. In view of this position, Ld. Advocate Shri K. S. Desai has vehemently submitted that the period of computation of limitation has to be commenced from the date when the claim has been made for the first time. Shri Desai is on the point of passing the order by the Corporation u/s. 45-A. In other words, Shri Desai, Ld Advocate for the Applicant intends to emphasise tht that the cause of action shall be from the date when the order for recovery has been passed.

12. Ld. Advocate for the Corporation Ms. Sawant has pointed out that the word "demand" has to be concentrated more. The Corporation makes a demand after the submission of the Inspection Report and after sending the C-11 Form or even a C-18 Form. Therefore, the period of limitation has to be computed from that day. This discussion, I have raised at this juncture because to ascertain in which matter the limitation has to be taken into consideration and that whether the provision of limitaion is available so far as fixing the interest and damages are concerned. While reading to the text used while drafting sub-clause (*b*) to sub-section (*1-A*) to Sec. 77, the words " interest and damages " are included. In pursuance of that, I refer to the observations of Hon'ble Supreme Court in a case of Goodyear India Ltd. *V/s.* Regional Director, Employees' State Insurance Corporation and ors. *(1997 I CLR 407).* Hon'ble Lordships therein, have referred to the scheme for drafting sec. 77-A by way of an amendment in the year 1989 and thereafter has observed that :—

> " It would thus be seen that the cause of action for contribution would arise only after the decision by the Insurance Court in the procedings is laid u/s. 75 of the Act. Until then, the cause of action cannot be said to have arisen. "

In other words, there is no bar of limitaion. It is seen that the Act was subsequently amended by sec. 30 of the Amendment Act, 28 of 89 which came into effect *w. e. f.* 20th January 1989. It provides application can be made within 3 years from the date of arising of cause of action. This amendment has no application to the proceedings in this case since the cause of action had arisen prior to the amendment. Under these circumstances, there is no bar of limitation for the payment of contribution, as contedned. While referring to the text and the rule laid down by the Hon'ble Supreme Court, the present fact of claiming the interest and damages is on the amount which was due prior to 1989 and not later. The notice admittedly is of 1992 and the order u/s. 45-B is also of 1992. Therefore, even if the point of view of Shri Desai, Ld. Advocate for the Applicant is taken into consideration, regarding order passed by the Regional Director u/s. 45-B of the Act, the question of limitaion will come into as u/s. 85-B, there is no specific provision for fixing the limitation as such.

13. Therefore, even if we consider from the Corporation's point of view for differentiating the term " claim " and " demand " is concerned, the Law Lexicon has described the said term " claim " is a word of very extensive signification, embracing every species of legal demand. It is one of the largest word of law and includes " demand " and " debt ".

The term also signifies the demand made of a right or supposed right, calling of another to pay something due or supposed to be due as a claim for wages or services. The claim is sufficiently comprehensive to embract an action founds of tort as well as the actions founded of contract ". While the word " demand " has been explained by the Law Lexicon in the same manner as " claim or request made as of right. A legal obligation; a requisition of request to do a particular thing specified under a claim of right on the part of the person requesting a thing or amount claimed to be due, a calling for a thing due or claimed to be due."

14. It is, therefore, very clear that the words " demand " or " claim " cannot be differentiated as both are internally interdependent and both can go hand in hand. In that sence, the Corporation can demand a contribution from the employer, whose establishment is covered under the Act and the Corporation can claim the interest for delayed payment and also claim the damages for delaying the payment, etc. In pursuance of that aspect, the period of computation of period of limitaion, therefore, has to be interpreted as from the date of demand. If this particular analogy is taken into consideration, then the word " claimed for the first time " will have to be taken into consideration. These words postulate that the Corporation has claimed the amount by way of

contribution and had called on the employer to pay the contribution. The payment of contribution as demanded is a prominent duty of the employer who has to remit the same forthwith the employer can *suo-mottu* also deposit the contribution if he finds that the establishment is covered under the Act. In pursuance of that, the demand made is of contribution first and not of the damages or interest at the first instance.

15. If the amount of contribution has not been paid, then the question of paying interest and damages will come. Therefore, in my opinion, the period of limitation shall have to be computed from the date when it is demanded or claimed. Admittedly the contribution part of it is concerned, the Applicant employer had paid the contribution and has raised the dispute so far as the payment of contribution at a late stage as because the documents were attached by the Central Excise Department. Admittedly, such lame excuses are not to be taken into consideration because once an employer comes to know that his establishment is covered under the Act, he has to go on making the compliance by depositing the amount and not waiting for any documents. It is the employer who is manning his own business and therefore he is supposed to know the total strength of the employees, the total expenditure made on the wages, repairs and maintainance, purchase of machinery, etc. items and by virtue of the legal propositions, he has to pay the contribution thereon as per the rules.

16. In view of the above contentions, when there is no dispute about the contribution, the intention of the legislature has to be understood in its strict sence because while derafting the provision of sec. 85-B, it has been made clear that it is by way of penalty to the ailing employers. The wording used while drafting Sec. 85-B as laid down under sub-clause (*1*) is that :—

> " Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recove (from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations). "

The proviso-clause specifices to give about giving of a reasonable opportunity to the employer and that the subsequent proviso-clause deals with the exceptions which can be made for recovering the damages. Therefore, the sub-clause (*1*) is only in respect of fixing the damages or ordering the damages and not for recovery of contribution, as such.

17. Hon'ble Calcutta High Court in this regard has specifically observed in a case of National Jute Maunfacturers Corporation *v/s.* E. S. I. C. and anr. *(1994 II LLJ 704)* that :—

> " The levey of damages as per sec. 85-B is a levy in the nature of penalty to teach the defaulter a lesson. Even though the word used is " damages " yet in the context, the ordinary concept of damages as flowing in a contractual or tortious action is inappropriate."

In para 6, it is further observed that :—

> "There is no special period of limitation prescribed anywhere in the Act for levy of penalty under Sec. 85 B."

It is, therefore, very clear that the section itself is very silent so far as the period of limitation is concerned. Therefore, the intention of the Statute was that of to make the provisions for ailing employers so that they will be deligent in future and therfore it cannot be said that whatever claim is made is beyond the period of limitaion because it relates to a period of 1976 onwards. Infact, whatever claim is made in not for claiming the contributions, but it is for the damages for not paying the contribution in time.

18. Ld. Advocate Ms. U. Sawant has relied on the observations of Hon'ble Andhrapradesh High Court in a case of Transport Corporation India Ltd. *V/s.* ESI Corporation and anr. *(1999 II LLJ 581)*. In para 9, Hon'ble their Lordships have observed that :—

> " It cannot be said that the claim of the EST Corporation was barred by limitation as the ESI Act itself was silent as to the period of limitaion as regard to the claim."

The word " Claim " here refers to under section 39 (S) and not u/s. 85-B. It relates to the term 'contribution'.

19. In the case of Siddeshwar and Co. *V/s.* ES. I. Corporation (F. J. R. Vol. 91 page 135), again pertains to the question of limitation if applicable or not. In that case, regard has to be given to the year of which amount is claimed. The introduction of limitation by way of amendment is of 1989. Obviously, the said new inserted provision will not be made applicable retrospectively unless it has been specifically directed to do so and therefore for the earlier period, the limitation will not come into. These observations also deal with the continuous cause of action. Hon'ble his Lordship has considered the first visit of the Insurance Inspector to the establishments and verification of records and assessing the amount paid by way of wages, etc. in the relevant period and also making a report for covering the establishment. It has been considered by Hon'ble his Lordship that the finding that had been recorded by the Inspector is based on the verification of records. Therefore, the obligation of the employer to pay his contribution as well as to pay the employee's contribution to the fund under the ESI Act will always prevail as the employer under social welfare legislation is required to comply with his obligations. Pursuant to this fact and by keeping all the earlier facts, as discussed, it is clear that the coverage is admitted by the employer. The payment of amount towards contribution is also admitted. The dates on which the amount is paid has also been admitted by the employer. Therefore, if it is transpired subsequently that the payment of contribution is at a very late stage, it cannot be said that the Regional Director was not justified in imposing the damages or claiming the interest. That claim of interest or damages cannot be first subjected to limitation or cannot be co-related with the period for which the amount of contribution was due. In that sense, it is very clear that the employer in this case has made lame excuses of not having the documents with him. As said earlier, it was the employer who was having the knowledge of the dues to be paid and therefore non-payment was rightly subjected for damages for passing the order u/s. 85-B of the Act. In *view* of the overall series of act, what has been transpired is that of the late payment and then passing the order of imposition of damages. The action taken by the Joint Regional Director cannot be discarded on account of limitaion. No such limit will be attributable to such process of recovery of damages.

20. Ld. Advocate Shri K. S. Desai has relied on the observations of Hon'ble Full Bench of Kerala High Court in a case of Regional Director, ESI Corporation *v/s.* Kerala Electrical and Allied Engineering Co. Ltd. and ors. (2003 III CLR 846). The observations therein are as follows :—

> " It is undoubtedly true that the provisions of a beneficial statute have to be liberally construed. In respect of the labour and welfare legislations, the courts have leaned in favour of a liberal rather than a literal construction. The colour, content, and context have always been kept in view by the courts. In such a case, the declared objective of the statute is an important guiding factor. The amendment was made not only to fix the terminus a quo but also to lay down an embargo on the right of the Corporation to make a claim.The Court should adopt an object oriented approach without doing violence to the plain language of the statute. The courts have to adopt a purposive construction. The Court has to adopt the interpretation, which will promote the true intent of the Legislature. The language of the provision being clear, the words have to be given their and apparent meaning. In the present case, the plain words of the statute are in complete harmony with the declared objective. When the two are construed together and harmonised, the inevitable inference is that the Corporation is debarred from making a claim after five years from the date on which the amount had become due. This construction is in consonance with the declared objective of the amendment, which was made in the year 1989. Only such claims, which are within limitation, can be recovered. The law helps the vigilant. The Courts do not grant the reliefs, which have become stale and time-barred."

While giving a rule, Hon'ble their Lordships have further ruled that prior to the introduction of the Amendment by Act 29 of 1989 in the ESI Act, 1948, it did not place any limitation on the right of the Corporation to raise the demand on the employer. This was unjustified and unfair. To

remedy the mischief, clause (*b*) to sub-section 77-1 (*A*) was substituted and the proviso was introduced. It was specifically declared that :—

" The Corporation shall not make any claim after 5 years from the date on which it had arisen."

The words are plain and clear. This has to be given a meaning and content. However, it is clear from the Regulation 66 of the ESI Regulations that the employer is not required to maintain the record in regards to the employees for a period of more then 5 years because it is difficult to preserve the records for an unlimited period. In pursuance of all these guidelines, it is very clear that Hon'ble their Lordships were referring to the word "claim" by referring to the term "contribution" on the wages disbursed by the employer. Therefore, it does not refer to the term "damages" or the term "interest", etc. It is, therefore, very clear that the period of limitation by way of amendment relates to the claim after 1989 to the claim by the Corporation so far as the regular contribution on the wages is concerned. Such provision will not be attributable for claim of contribution prior to 1989 and also, on failure of an employer to pay the amount within limitation, which attracts a penal provision of paying the damages. In short, the payment of damages u/s. 85-B has to be freed from limitation. The damages are required to be paid if contribution is not paid in limitation. The payment of contribution does not require the Registers like Wage Ragister or Muster. The employer is within the knowledge of the expenditure and therefore can deduct the amount of contribution to be paid to ESI Fund. With all this discussion, I hold that the claim of the Corporation cannot be said to be barred by limitation. Hence, my finding to the point accordingly is in *Negative.*

21. *Issue No. 2 and 3.*—Once it is found that the Applicant has not paid the amount of contribution in time and once it is found that the defence of the Applicant that the documents were with the Central Excise Department therefore the contribution could not be paid is not justified, then the veracity of the order passed by the Corporation u/s. 85-B cannot be treated as unjust, illegal or unfair. With this discussion, I have given my findings to the issues accordingly and pass the following Order :—

Order

(*i*) Application is hereby dismissed.

(*ii*) Costs will be costs in cause.

(*iii*) Operation of the order is stayed for a further period of 8 weeks from today to enable the Applicant to take appropriate steps, if any.

P. B. SAWANT,
Judge,
Employees' Insurance Court, Mumbai.

Mumbai,
dated the 20th November 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
dated the 1st December 2003.

IN THE INDUSTRIAL COURT AT MUMBAI

COMPLAINT (ULP) No. 312 OF 1997.—Maharashtra Association of General workers, C-1, Dattatraya Apartment, Dahanukar Wadi, Kandivali West, Mumbai 400 067.—*Complainant.—V/s*—(1) M/s. Steelage Industries Limited, Opp. Mazgaon Post Office, Mazgaon, Mumbai—400 010, (2) Shri D. Khetrapal, Director, M/s. Steelage Industries Limited, Mumbai 400 010. (3) Shri A. R. Gujjar, Personnel Manager, M/s Steelage Industrie Limited, Mazgaon, Mumbai 400 010.—*Respondents.*

In the matter of complaint of unfair labour practices under items 6 of Sch. II and items 5, 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act. 1971.

PRESENT.—Shri P. P. Patil, Member Industrial Court, Mumbai.

Appearances.—Shri N. R. Kolte, Advocate for Complainant Union.

Shri Mohit lapoor Advocate for Respondents.

Judgment and Order

(Dated the 20th November 2003)

1. This complaint is under Sec. 28 read with items 6 of Sch. II and items 5, 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act 1971. Complainant union is claiming that the Respondents engaged in unfair labour practices covered under item 6 of Sch. II and items 5, 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act, by not making them permanent and failure to provide benefits of permanency.

2. Facts in brief of preset complaint are as under :—

Respondent No. 1 is angaged in the manufacturing of steel furniture. Respondent No. 2 is Director and Respondent No. 3 is Personnel Manager respectively. Respondents have employed more than 300 workmen for carrying out their manufacturing activity. Respondents want to get rid of permanent employees and give work of permanent nature on contract basis. Therefore, lock out was effected on 29th October 1992 with an intention to pressurise the workmen, Respondent No. 1 company lifted lockout with effect from 5th September 1983 and allowed some workmen to do the work. The Respondent, however, did not like some of the workmen, including the workmen mentioned in Annexure-A filed with present complaint to report on duties. Therefore, the workmen mentioned in Annexure-A joined the Complainant union, and informed the Respondent company by their letter dated 29th March 1994 about formation of the complainant union. The complainant union demanded employment of 6 workmen *vide* its letter dated 31st March 1994, but the Respondent did not like the workmen to report on duty, therefore. Complainant union filed complaint (ULP) No. 401 of 1994 before Industrial Court, Mumbai, but the said complaint came to be dismissed on technical ground of delay on 24th September 1996. Complainant union had challenged the order dated 24th September 1996 in Writ Petition No. 321 of 1997 before Hon'ble High Court, Mumbai, and the Hon'ble High Court was pleased to refuse to interfere with said order of Industrial Court, but granted liberty to the Complainant union to file a fresh complaint.

3. The workmen listed in Annexure-A have completed 240 days cantinuous service in a calender year long back. Respondent company is cevered under the provisions of Model Standing Orders framed under the Industrial Employment (Standing Orderes) Act, 1946. therefore, it was obligatory on the part of the Respondents as per provisions of clause 4 (*c*) of standing orders to make workman permanent on completion of 240 days uninterrupted service in 12 calender months. But the Respondents did not take appropriate steps to make the workmen permanent with an intention to deprive them of their wage scales and service conditions at par with permanent employees, therefore, the Respondents engaged in unfair labour practices covered under items 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act.

4. As the Respondents have refused employment to the workmen listed in Annexure-A it amounts to lock out without notice, therefore, the said lock out is illegal and also in breach of contract of employment covered under item 6 of Sch. II and under item 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act. The Respondents have taken 60 workmen in the employment out of which 13 are juniors to the workmen listed in Annexure-A and rests are new recruits. Thus, the Respondents are showing favour to other workmen therefore, it is an unfair labour practice under item 5 of Sch. IV of M. R. T. U. and P. U. L. P. Act. hence filed the present complaint for relief of directing the Respondents to make the workmen permanentas mentioned in Annexure-A and extend them benefits of permanency, Also directions were sought against the Respondents to allow the workmen to report on duty immediately.

5. The Respondents have filed their written statement at Exh. C-14 wherein contended that the disputs is already settled by virtue of settlement dated 31st May 1991 between the Respondent company and the union and accordingly services of the wrokmen were terminated on the dates mentioned against their names mentioned in Annexure-A attached to the written statement. The workmen concerned are not in employment of the Respondent company right from the dates mentioned against their names and thus the question of taking them in employment after lifting of lock out does not arise. Further contended by the Respondents that refusal to allow workmen to report of duty amounts to termination of service for which complaint should have beeen filed under item I of Sch. IV of M. R. T. U. and P. U. L. P. Act and not under item 6 of Sch. II of the Act. The workmen since 14th October 1992 *i. e.* the date of displaying the lock out notice are not in employment of the Respondent company therefore, the question of taking them back in employment does not arise. As per order and judgment passed by Hon'ble High Court in writ Petition No. 321 of 1997, the Complainant union was directed to raise issue of permanency as according to the Complainant union, there were temporary wrokmen, who had completed 240 days or more during relevant period. The workmen can claim permanency who are in employment and the request of the Complainant union cannot be considered because the concerned workmen are not in the employment of the Respondent company.

6. The Complainant union was nevar operating in the Respondent company in the past, nor it is operating now, therefore, cannot file the complaint. It is denied by the Respondents of engaging in any unfair labour practice as alleged. According to the Respondents, they have employed near about 317 workmen for carrying out their manufacturing activities. It is denied by the Respondents that with an intention to get rid of parmanent workmen give work of permanent nature on contract basis. The averment made by the Respondents to the effect that since the inception, there is no contract system prevailing in the plant except in the canteen. It is also denied by the Respondents that the lock out was declared on 29th October 1992 and it was lifted on 5th September 1993. It is denied by the Respondents that they did not allow some of workmen including the present workmen mentioned in Annexure-A to report on duty. Since the workmen mentioned in Annexure-A were not in employment of the Respondent company either at the time of effecting lockout or lifting it, the question of reporting their duty during relevant period does not arise. It is denied by the Respondents that the workmen are entitled for permanency because they have completed 240 days uninterrupted service as per provisions of clause (c) of model standing orders. According to the Respondents, the provisions of clause 4 (c) of model standing orders are applicable to temporary workmen and not to casual workmen. The workmen whose names were mentioned in Annexure-A were the casual workmen. The allegations are denied relating to permanency of workmen who are juniors to the present workmen mentioned in Annexure-A and also regarding unfair labour practices covered under item 6 of Sch. II and items 5, 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act.

7. On the basis of pleadings of parties, my Learned Predecessor was pleased to frame following issues to which I have given my findings.

Issues	*Findings*
(1) Whether the Complainant union proves that Respondents are engaged in unfair labour practices, as alleged ?	(1) No.
(2) Whether Complainant union is entitled to any relief/reliefs ?	(2) No.
(3) What orders ?	(3) Complaint dismissed.

Reasons

8. The Complainant union has come with the grievance of 15 workmen of not making them permanent though completed 240 days uninterrupted service during preceding 12 months. All 15 workmen were in employment of the Respondents company since 1983 as helpers till 1991. On 29th Octobar 1992, the Respondents have effected lockout of the company as per notice of lockout dated 14th Octobar 1992 displayed on the notice board. As per the salary slips filed under the list Exh. U-19, the workmen are claiming that they have not received their wages from 14th October 1992 to 29th October 1992. The lockout was lifted on 5th September 1993. According to Complainant union, all 15 workmen reported on duty on 5th September 1993 but the Respondents did not allow them to join their duty and told them that as per requirement work will be allotted to them. Reference has come about junior workmen re-employed by the Respondents *viz*. Shashikant Bhalerao, Suresh Chawan, V. Kumar, Kishor Mahanama, Vijay Mahanama, Kunju Pillai, Shamrao Sanas and Havaldar Yadav. The names of workmen referred above at the first time stated by witness of the Complainant union Mr. Prakash Anant Ghadi. The case of Respondents is that 15 workmen for whom the present complaint is filed by the Complainant union were not made aware about the lockout notice bacause they were not in employment of the Respondent company at that time.There is no dispute that the lockout was lifted on 5th September 1993. According to Respondents, after lifting of said lockout there was an agreement with the workmen's representatives *vide* Exh. C-25 and the workmen who were in employment of Respondent company, their names were mentioned in said agreement. The workmen, who were in employment of the Respondent company were allowed to join their duty. The Respondent company has placed on racord the standing orders at Exh. C-26 and on the basis of the said document tried to convince the Court that as to how the workmen though continuously worked for 240 days in preceding 12 months not entitled to claim permanency, because there is no such provision in the certified standing orders. But the witness Mr. Eknath Dhoke examined by the Respondents has admitted in his cross-examination that the workmen who have completed 240 days continuous service in a calender years is entitled for permanency as per the standing orders.

9. The Complainant union has examined witnesses, Mr. Prakash Ghadi and Mr. Tulsiram Tambe. Prakash Ghadi was member of Complainant union and he was employed in 1983 by the Respondent company and he was continued in the employment till 1991. On carefully going through the testimony of the witness Prakash Ghadi, it is clear that after 1991 he was not in employment of the Respondent company, even on the date the lockout was declared by the Respondents. Witness Ghadi has admitted in his cross-examination that he did not send any letter after 5th September 1993 to the Respondent company requesting to allow him to resume duty, nor wrote a letter to the Government making grievance that the Respondent company is not allowing him to resume his duty. There is no dispute over the issue of declaring lock out by the Respondent company with effect from 29th October 1992 by lockout notice dated 14th October 1992. Witness Tulsiram Tambe

for the Complainant admitted in his evidence that he had received a letter dated 29th March 1995 from the Respondent company *vide* Exh. U-28 and thereby he was called upon to attend duty. According to this witness, in persuance of said letter Exh. U-28 he had been to the Respondents company to resume his duty on 29th March 1995 at 8-30 a. m. but the Respondents did not allow him to resume his duty because the case is pending in the Court. Except oral evidence of Prakash Ghadi and Tulsiram Tambe witnesses for the Complainant union, there is no documentary proof on record to substantiate the allegation that 15 workmen whose names are mentioned in Annexure-A had been to the Respondent company to report on duty, but the Respondent did not allow them to resume their duties.Witness for Complainant Union Tulsiram Tambe has admitted in his evidence that he was aware about the agreement between the Respondent company and Association of Engineering Workers in 1991 in respect of regularisation of services of casual workmen and according to said agreement, 28 casual workmen have mad parmanent.

10. The Respondent company has examined witness Eknath Dhoke who has supported the fact of declaring lockout by notice dated 14th October 1992 which was effected with effect from 29th October 1992. This witness has given history of other Complaints (ULP) No. 401/1994 and 437/2000, Complaint (ULP) No. 401/1994 was filed by the present Complainant union which came to be dismissed by order dated 18th September 1996 wherein it was observed that the Complainant union came into existence on 29th March 1994 and if this was the position, it is not understood as to why the employees kept mum till 29th March 1994 about their right to work after lifting of lock out, It is pertinent to note that complaint (ULP) No. 401/1994 came to be dismissed by order dated 18th September 1996 holding that the said complaint was barred by limitation.

11. Copy of Memorandum of Settlement dated 31st May 1991 is filed on record under list Exh. C-7 in which condition No. 4 contemplates that since the issue of casual workmen and their permanency has been discussed by the union alongwith committee members at length, since the union Represents all casual workmen who are from time to time employed by the Respondent company, the remaining casual workmen, present and future, through the union and the union itself hereby jointly and severally agree that neither the Complainant nor any of the said casual workmen from the casual labour group shall agitate herainafter for their permanent employment. In certified standing orders, clause 4 (*c*) says that if a permanent workman is employed as a probationer in a new post, he may at any time during the probationery period to be reverted to his own permenant post by an order in writing signed by the Manager, In the certified standing Orders *vide* Exh. C-26 there is no specific provision of making workmen permanant after completing 240 days continuous service in preceding 12 months. Xerox copy of complaint (ULP) No. 437 of 2000 is no record, which was filed by 8 workmen against the Respondents for claiming reliefs to direct the Respondents to give status of permanent employees and pay wages at par with permanent employees. The settlement dated 3rd May 1993 Exh. C-25 is placed on record. The said settlement is between the Respondent company and representatives of workmen.

12. The Learned Advocate for Respondents streneously argued the point of maintainability of present complaint and limitation. Both the points have already been considered by my Learned Predecessor. By order dated 15th March 1999 application for condonation of delay Exh. U-4 filed by the Complainants has already been allowed. As well as order dated 20th April 2001 reflects that my Learned Predecessor was pleased to decide the issue of maintainability of complaint as preliminary issue and held that the present complaint is maintainable in view of provisions of Sec. 21 of M. R. T. U. and P. U. L. P. Act. Therefore, I find no substance in the arguments advanced by the Learned Advocate for the Respondents on said issues as already finally decided. The Learned

Advocate for Respondents has placed reliance on the case of Food Corporation of India *V/s* Central Industrial Tribunal and others reported in 1996 LIC 2287 Calcutta, wherein held in Para 14 that :—

"When the authority of the union is challenged by the employer, it must be proved by production of material evidence before the Tribunal to which such a dispute has been raised, that the union has been duly authorised either by a resolution of its members or otherwise, that it has the authority to represent the workmen whose cause it is espousing. Mere fadt that the said union is registered under the Indian Trade Unions Act is not conclusive proof of its real existence or the authority to represent the workmen in the Reference before the Tribunal."

Further case relied on by Learned Advocate for Respondents is Brook Bond India Limited *V/s* Workmen reported in 1981 II LLJ 184 SC, wherein held.—

"Industrial Disputes Act, 1947-Ss. 2 (*P*), 10 (*1*) (*d*), and 18 (*1*).— Agreement between employer and employees, the office bearers of union of workmen signing the agreement Office bearers have no authority to sign the agreement whether the agreement in such circumstances valid."

There is no proprety to agitate the said issue *i.e.* the dispute regarding maintainability of complaint and limitation in view of orders already passed and finally decided the controversy.

13. The Learned Advocate for Respondents has streneously argued that the concerned workmen cannot claim permanency when since before lock out of the Respondent company they were out of employment and after lifting the lock out they did not take steps to report on duty. In short, according to Respondents, there is no relationship of employer and employees exists since 1991 between the concerned workmen and the Respondent company, therefore, question of consideration of permanency does not arise and no such benefit be granted when the workmen are not in employment of the company. In support of his arguments, Learned Advocate for the Respondents is placing reliance on the case of Patel Engineering Works *V/s* Shri Santosh Kumar Rawool and others reported in *2001 I CLR 674 Bombay,* wherein held :—

"Similarly the number of persons employed has also gone down. The company has announced a voluntary retirement scheme also. It has reduced its permanent strength from 387 in the year 1995 to 132 as on 1st August 1998. The turn over and strength of employees has roduced substantially. If the permanent strength of the employees has substantially gone down, it will not be just and proper to direct the petitioner company to regularise the casual workers merely because at some point of time they had completed 240 days or so."

Further reliance is placed by him on the case of Satendradeo Sharma and others *V/s* State of Utter Predesh and others reported in 2003 (98) FLR 462 Allahabad wherein held in Para 3.—

"The services of the petitioner were terminated in 1993. Unless termination is set aside, they cannot be regularised. The dispute regardingly validly and correctness of termination requires adducing oral and documentary evidence, which cannot be adduced before this Court under Article 226 of the Constitution of India."

According to Respondents, the concerned workmen as they did not report on duty since 1991, they cannot claim a status of an employee of the Respondent compay. Much emphasis is given by the Learned Advocate for Respondents on the point that specific date of completion of 240 days is not mentioned in the complaint nor stated by the witnesses of the Complainants in evidence and the vague statement on such point should not be considered. Further he has urged that the burden is on the concerned workmen to prove that they have continuously worked 240 days in a calender year, which is not completely discharged in the present case. Also reliance is placed on the case of Luddur Algoo Yadav *V/s* The General Manager, India United Mills and others reported in *1996 I CLR 1044 Bombay*, wherein held in Para 6.—

"The registered agreement between the employer and the representative union is binding upon all the employees in the industry. Thus, the terms of the registered agreement dated 14th June, 1989 are binding upon the petitioner, and in the face of the registered agreement, he cannot press for permanency as a Beam Carrier. On merits, the claim of the petitioner must fail as has been rightly rejected by the Industrial Court."

Taking assistance of the ratio laid down in above referred case, Respondents company is trying to show that once the union entered into an agreement and accepted the terms and conditions including exclusion remaining casual workmen for granting them permanency and this condition is binding upon the concerned workmen. Further the Learned Advocate for Respondents adds that even the casual workmen presumed to be completed 240 days of continuous service, they do not derive a right to be permanenty absorbed in the service and this statement is made on the basis of ratio laid down in the case of The Supdt. Durgapur Sub-Division Hospital, *V/s* Sarma Das and otheres reported in FLR (1997) (75) 945 Calcutta, wherein held that :—

> "For the reasons aforementioned, we are of the opinion that the appellants did not derive any legal right whatsoever to be absorbed in permanent service only because they allegedly had worked as casual labourers for a period of more than 240 days."

There is no sufficient evidence on record renderring continuous service by the concerned workmen uninterrupted 240 days during period of a calendar year, Also dispute is raised by the Learned advocate for Respondents that over the applicability of clause 4 (c) of Model Standing orders because of the Respondents having its own cartified standing orders in which no clause of granting permanency to casual workman after completion of 240 days uninterrupted service in a calendar year is incorporated. Learned Advocate for the Respondents is further placing reliance on the case of Voltas Limited *V/s.* KD Kochargonkar and othere reported in *FLR 1996 (72) 810 Bombay* wherein held in Para 7 :—

> "Once the amendments have been certified, the certified standing orders operate. An amendment to the model standing orders cannot, threfore, have effect until and unless modification to the certified standing orders to bring them into line with the amended model standing orders is proposed and certified."

14. The present complaint is for unfair labour practices on the part of the Respondents covered under item 6 of Sch. II and items 5, 6 and 9 of Sch. IV of M. R. T. U. and P. U. L. P. Act. Item 6 of Sch. II is relating to unfair labour practices on the part of the employer for proposing or continuing a lock out deemed to be illegal under the Act. In the instant case, lock out has already been lifted with effect from 5th September 1993. There is no declaration from the competant authority that the lock out notice dated 14th October 1992 by which declared lock out with effect from 29th October 1992 is illegal and unsustainable. Unfair labour practice covered under item 5 of Sch. IV is relating to show favouritism or partiality to one set of workers regardless of merits. Witness No. 1 for the Complainant union Mr. Ghadi has given names of some workmen claiming juniors to the concerned workmen and they are re-employed in employment by the Respondent company. The Complainant union is not claiming employment for 15 workmen under Sec. 25-H of Industrial Disputes Act. On the contrary, the substantive relief is of permanency. So also, there is no evidence on record to show that violation or breach of any settlement, agreement or award. Learned Advocate for the Complainant union placing reliance on the case of Dattatraya S. Khade and others V/s Executive Engineer, Chief Gate Errection *Unit No. 2* Nagpur and others reported in *1993 I LLJ 395 Bombay,* wherein held that non compliance of Sec. 25-F and Sec. 25-G of ID Act before termination of service of an employee were serious misconducts on the part of the employer. The facts of present complaint are entirely different than the facts of case referred above. It in not the case of the Complainant union that before termination of services of concarned workmen, the Respondent company failed to comply with provisions of Sec. 25-F and 25-G of ID Act. Learned Advocate for complainant union is placing reliance on the case of Maharashtra Small Scale Industries Development Corporation Limited and others *V/s.* Industrial Court, and others reported in *1990 I CLR 711 Bombay* wherein held in Para 2 that :—

> "In my view, the real question that falls for consideration is whether the Respondents No. 2 was working as Assistant for several years at the behest of the petitioners. This is a pure question of fact and the Industrial Court has dealt with this aspect *exhaustively* and has recorded a finding that the Respondent No. 2 has been working as an Assistant. Had he not been qualified, as is being, contended now, then surely he would not have been allowed to work in that post for such a long time. Thus, I see no reason to take a view different from the one alreday taken by the Industrial Court on this count."

In the instant case, there is no dispute that since 1991-92 the concerned workmen were not in employment of Respondent company. After lifting the lockout, the concerned workmen's stand is that several attempts were made by them to report on duty, but they were not allowed by Respondents to resume on duty. But the Respondents have come with defence that the concerned workmen never come to report on duty, nor they sent letter or contacted. Reliance is also placed by the Learned Advocate for Complainant union on the case of The State of Maharashtra and others V/s P. P. Salve and Ors. reported in *1991 II CLR 474 Bombay* where in held in Para 7 :—

> "I, therefore, find no error apparent on the face of the record in the impugned orders passed by the Learned Member of the Industrial Court in holding that the first Respondents were doing the work of permanent nature and they were the daily rated workmen employed by the petitioners. Although the first Respondents wanted to be in the category of permanent workmen effective from the date on which they have completed one year of service."

The Complainant union is taking help of ratio laid down in the case of the Chief Officer, Sangli Municipal Council, Sangli *V/s* Shri Darmasingh Hiralal Nagarkar reported in *1991 II CLR 04 Bomaby* wherein held in Para 5 :—

> "There is no substance in this argument of Mr. Jamdar for the simple reason that the State Selection in Board was a source for appointing a fresh candidate and in the matter of a person already appointed, it would not be difficult for the petitioner council to make him permanent, For the purpose of making a workmen permanent or not the petitioner council had not to consult the State Selection Board. Under the circumstances, I find it difficult to persuance myself to agree with the submission of Mr. Jamdar that the petitioner council did not commit unfair labour practice covered by item 6 of Sch. IV of the M. R. T. U. and P. U. L. P. Act."

The facts of case referred above are not identical with the facts of present case and no controversy is involved regarding appointment of a person recommended by the State Selection Board. The complainant union is also placing reliance on the case of H. D. Singh *V/s* Reserve Bank of India and others reported in *1985 II CLR 246 SC.* The ratio laid down in the above case is in respect of striking of name of workman from the muster roll by the employer and such controversy is not involved in the present case, therefore, it is not helpful to the case of the Complainant union. Further reliance is placed on the case of R. P. Sawant and others *V/s* Bajaj Auto Limited and others reported in *2001 II CLR 1982 Bombay,* wherein held in Para 74 :—

> "As far as item 6 is concerned, all that had to be done by the Industrial Court was; (i) to see if the parties for years together and (*b*) it was a matter in reference in the facts and circumstances which the Industrial Court legitimately drew. We see no reason why the inference drawn by the Industrial Court on the facts could have been interfered with in exercise of writ jurisdiction in any event, we have seen no good reason in the order of the Learned single Judge to justify inference with them."

15. There cannot be a dispute ever the point of workman completing 240 days continuous service in a calendar year. He can claim for permanency and regularisation of service in view of provisions of clause 4 (c) of model Standing Orders. In this view of matter, the Complainant union is trying to take help of the case of Rashtriya Mill Mazdoor Union *V/s* SL Mehendale and others reported in *2000 I LLN 94 Bombay,* wherein held in Para 9 :—

> "The said standing order was introduced in order to stop the exploitation of the workmen in the textile mills who were kept temporary for number of years without conferring any status of permanency and benefits of permanent workmen. Therefore, the argument of Shri Naphade that there is a conflict between Model Standing Order and Sec. 42 must be rejected."

The concerned workmen have not raised the dispute regarding the conflict between Model Standing Orders and Sec. 42 of ID Act. The Labour and Industrial Laws being the social laws and the workmen are beneficiaries therefore the provisions of law protecting the maximum interest of employees should be considered. Hence the arguments advanced by the Learned Advocate for Complainant union on the applicability of the provisions of clause 4 (c) of Model Standing Orders. Therefore, it was necessary on the part of the employer to make the concerned workmen permanent as seen as they complete 240 days uninterrupted service in a calendar year, I am not in agreement with the statement made by the Learned Advocate for complainant union because there is no sufficient evidence to come to conclusion that the concerned workmen have completed 240 days uninterrupted service. In the same way, the concerned workmen since 1991-92 are not in employment of the Respondent company. Having been considered such facts and circumstances of the complaint, I find no substance in the relief of permanency.

16. The Complainant union has failed to establish that the Respondents engaged in unfair labour practices as alleged. There is no question of consideration of claim of permanency, because the concerned workmen could not bring evidence through their union that they are in employment of the Respondent company since 1991-92. Since before the declaration of lock out, the concerned workmen were not in employment of the Respondent company. No evidence that after lifting the lock out *i. e.* from 5th September 1993 the concerned workmen were serious to report on duty. It is the case of the Complainant union that the concerned workmen several times and been to the Respondent company to report on duty but they were not allowed to resume duty, and if such was the fact then why the concerned workmen kept mum. No case is made out by the Complainant union either for declaring the Respondents engaged unfair labour practices as alleged, therefore, entitled the concerned workmen for permanency and the wages from 5th September, 1993 till they allowed to resume duties. In this back ground, the present complaint deserves to be dismissed as per order passed below :—

Order

Complaint (ULP) No. 312 of 1997 is dismissed.

No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 20th November 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Mumbai, Dated the 27th November 2003.

ON BEHALF OF GOVERNMENT PRINTING, STATIONERY AND PUBLICATION, PRINTED AND PUBLISHED BY SHRI PARSHURAM JAGANNATH GOSAVI, PRINTED AT GOVERNMENT CENTRAL PRESS, 21-A, NETAJI SUBHASH ROAD, CHARNI ROAD, MUMBAI 400 004 AND PUBLISHED AT DIRECTORATE OF GOVERNMENT PRINTING, STATIONERY AND PUBLICATION, 21-A, NETAJI SUBHASH ROAD, CHARNI ROAD, MUMBAI 400 004, EDITOR : SHRI PARSHURAM JAGANNATH GOSAVI.